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No._____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

H. L. DILLON, JR., ET AL., *Petitioners*

v.

MICHEL T. HALBOUTY, ET AL., *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

*To The Honorable Supreme Court of The United States:*

Petitioners, H. L. Dillon, Jr., Roger L. Bauman, J. H. Cordell, John Hill, John Marshall, John W. Pace, Gray Oil Company, a partnership composed of E. J. Gray, and Eddie V. Gray, and J. C. Barnes, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in this case.

## OPINIONS BELOW

The opinions in the Supreme Court of Texas in this case have not yet been officially reported. The majority opinion is unofficially reported in *Halbouty v. Railroad*

*Commission*, 357 S.W. 2d 364, and is copied, Appendix "A", infra, p. 25. The dissenting opinion of Associate Justice Smith on rehearing is reported in 357 S.W. 2d 376, and is copied, Appendix "B", infra, p. 49.

The opinion in the companion case of *Halbouty v. Darsey*, reported in 326 S.W. 2d 528 (Tex. Civ. App., writ refused, no reversible error, by the Texas Supreme Court), is copied, Appendix "C", infra, p. 64.

## JURISDICTION

(1) The judgment of the Supreme Court of Texas sought to be reviewed was dated and entered February 14, 1962. The Supreme Court of Texas is the highest court in Texas in which a decision herein can be had.

(2) The date of the order of the Supreme Court of Texas overruling petitioners' motion for rehearing is May 23, 1962. The judgment of the Supreme Court of Texas is therefore a final judgment. This petition is being filed within the time provided by United States Code, Title 28, Section 2101(c).

(3) The statutory provision believed to confer jurisdiction on this Court to review the judgment of the Supreme Court of Texas by writ of certiorari is United States Code, Title 28, Section 1257(3).

## QUESTIONS PRESENTED FOR REVIEW

(1) Are petitioners' rights under the due process clause of the Fourteenth Amendment to the United States Constitution (which, as construed in *Saunders v. Shaw*, 244 U.S. 317, requires that petitioners be granted a hearing on material issues) violated by the decision of the Supreme Court of Texas rendering judgment against petitioners instead of remanding the case to the trial court to allow

petitioners to controvert evidence as to offers to unitize their leases with other properties, because petitioners have not had a chance to offer their evidence on this issue, since the trial court ruled evidence on this issue to be immaterial and it was first considered to be material by the Texas Supreme Court in its decision in this case? (This question was presented to the Texas Supreme Court by petitioners' assignment of error No. 12 in their Motion for Rehearing copied, Appendix "D", infra, p. 73).

(2) Are petitioners' rights under the due process clause of the Fourteenth Amendment to the United States Constitution violated by the judgment of the Texas Supreme Court cancelling the proration order of the Railroad Commission involved in this case (which order would have permitted petitioners to produce from their wells a sufficient amount of gas to repay drilling and production costs and provide only a reasonable profit), on the ground that petitioners are not entitled to produce from their wells such an amount of gas if petitioners "were offered unitization which would afford them a fair share of the mineral proceeds from a common source," because there is no statute in Texas authorizing or providing any procedure for compulsory unitization of separate tracts and there is not any statutory or other reasonably definite legal standard by which the fairness or validity of an offer of unitization can be determined? (This question was presented to the Texas Supreme Court by petitioners' assignment of error No. 14 in their Motion for Rehearing, copied, Appendix "D", infra, p. 74).

(3) Are petitioners' rights under the due process clause of the Fourteenth Amendment of the United States Constitution (which guarantees that petitioners will not be deprived of their property without a fair hearing) vio-

lated by the judgment of the Texas Supreme Court, because no procedure is provided for any prior judicial or other fair hearing on the complex questions of the fairness and validity of unitization offers and any hearing that may be granted will be only after petitioners have decided to reject the offers to unitize and in such a hearing the penalty against petitioners for having guessed wrong will be the confiscation of petitioners' investments in wells which petitioners have already drilled? (This question was presented to the Texas Supreme Court by petitioners' assignment of error No. 13 in their Motion for Rehearing, copied, Appendix "D", infra, p. 73).

(4) Are petitioners' rights under the due process clause of the Fourteenth Amendment to the United States Constitution (which guarantees that the petitioners will be given rates or allowables that provide petitioners a fair return on their investments made under state franchises) violated by the decision of Texas Supreme Court, which cancelled the 1/3 - 2/3 proration order and denied to petitioners the right to an allowable sufficient to give them any return on their investments made under the Texas Railroad Commission's Rule 37 permits? (This question was presented to the Texas Supreme Court by petitioners' assignments of error Nos. 16 and 17, in their Motion for Rehearing, copied, Appendix "D", infra, p. 75).

## CONSTITUTIONAL PROVISION, TEXAS STATUTES, AND RAILROAD COMMISSION ORDER INVOLVED

The constitutional provision involved is the second sentence of Section 1 of the Fourteenth Amendment to the Constitution of the United States. See Appendix "E", infra, p. 76.

The Texas statutes involved are Articles 6008, 6008b, and 6014, Vernon's Texas Civil Statutes, the pertinent parts of which are copied, Appendix "E", infra, p. 76.

The order of the Railroad Commission involved is Oil and Gas Docket No. 128-#3-38,395, dated August 18, 1958, entitled "Special Order Adopting Rules and Regulations for the Port Acres (Lower Hackberry) Field, Jefferson County, Texas," of which the pertinent part is Rule 3, copied, Appendix "E", infra, p. 81.

## STATEMENT OF THE CASE

### 1. Preliminary Statement

There is no question of waste or conservation, as usually understood, involved in this case. This case only involves the question of correlative rights between the big tract operators on one hand and the small tract operators on the other hand. The Texas Supreme Court reversed and rendered the judgment of the trial court which had sustained the gas proration order of the Texas Railroad Commission, the Texas Supreme Court holding that, because there was an indication in the record by bill of exception that petitioners had been offered the rights to unitize or pool their lands with the respondents' properties, this was not a proper case for the Railroad Commission to allow the petitioners, small tract operators, to recover a sufficient amount of gas to repay drilling and production costs and provide a reasonable profit, and that the Railroad Commission's 1/3 per well - 2/3 acreage proration rule for the Port Acres Field was therefore invalid. The operational effect of the Texas Supreme Court's decision is that the Railroad Commission's proration rules, allocating allowables 1/3 per well - 2/3 acreage for gas fields and ½ per well - ½ acreage for oil fields, in many oil and gas fields in Texas,

involving thousands of operators and investors, have been declared invalid, and that small tract owners' investments, running into millions of dollars, are subject to confiscation for the benefit of large tract operators, if the small tract owners have guessed wrong on whether they must accept offers to unitize their small tracts with the big tracts.

## 2. Summary of Proceedings in Texas Courts

The respondents, Michel T. Halbouty, Meredith and Company, Peter Henderson Oil Company, and Pan American Petroleum Corporation, are the operators of large producing units in the Port Acres Field. They brought this suit against the Texas Railroad Commission to cancel the proration order for the field, attacking the part of the allocation formula which provided that 1/3 of the allowable production should be allocated equally among the individual wells on the ground that gas wells completed on small tracts were thereby permitted to produce gas in excess of the gas in place beneath such tracts and that such excess was drained from the large units.[1]

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1 The same contentions were unsuccessfully urged against proration orders of the Railroad Commission of Texas assigning much larger portions of the allowable production on a per-well basis in **Railroad Commission v. Rowan & Nichols Oil Co.**, 310 U.S. 573; **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U.S. 570; **Railroad Commission v. Humble Oil & Refining Co.**, 311 U.S. 578; **Railroad Commission v. Humble Oil & Refining Co.**, 193 S.W.2d 824 (Tex.Civ.App., writ refused, no reversible error), affirmed in **Humble Oil & Refining Co. v. Railroad Commission and Williams v. Railroad Commission**, 331 U.S. 791. In the last of these cases, known as the **Hawkins** case because it involved the Hawkins oil field, the Texas court had emphatically upheld the right of small tract owners to allowables which would permit them to be "drilled and operated at a reasonable profit," (see 193 S.W.2d at 832) although "substantial uncompensated excess drainage" from the large tracts was conceded. (See 193 S.W.2d at 829).

The petitioners, H. L. Dillon, Jr., et al., intervened in the suit in defense of the Railroad Commission's order. Petitioners are the owners and operators of gas wells drilled upon small units in the Port Acres Field. Petitioners' wells were drilled under permits granted by the Railroad Commission, each well being drilled upon a separately owned tract. The validity of the orders of the Railroad Commission granting the drilling permits to the petitioners was not attacked in this suit, their validity having been settled by the decision in the companion case of *Halbouty v. Darsey*, 326 S.W. 2d 528 (Tex. Civ. App., writ refused, no reversible error, by Texas Supreme Court). See Appendix "C", infra, 64.

Evidence at the trial showed that there were then twenty-five gas wells drilled on large units or tracts and twenty-two gas wells drilled upon small tracts containing 5 acres or less. The evidence further showed, as recited in the opinion of the Texas Supreme Court, that each of the wells drilled upon a small tract, under the 2/3 acreage - 1/3 per well allocation formula, would have a total gross income from production of gas, to the end of its productive life, of approximately $407,501.00, that the total cost of each of such wells, including drilling, operating, and royalty expenses, would be approximately $361,674.00, leaving a net income above such expenses over the entire productive life of each well in the amount of approximately $45,827.00. On the other hand; it was shown that if the allocation formula was changed so as to eliminate the well factor and the entire field allowable was divided on the basis of the acre feet of producing sand beneath each producing unit, then the total gross income from production of gas from each well on a small tract would be only approximately $50,867.00. It was the

position of petitioners at the trial that the Railroad Commission's proration order was reasonable and valid, in that it properly took into account petitioners' right to develop each separately owned tract by drilling a well thereon, and that the portion of the allocation formula, dividing 1/3 of the total allowable production equally among the wells, resulted in the assignment to petitioners' wells of no more allowable production than was reasonably necessary to pay for drilling and operating costs and provide a reasonable profit.

During the trial, respondents Halbouty and Peter Henderson Oil Company sought to introduce in evidence portions of the transcript of the hearing before the Railroad Commission of Texas in which those respondents made offers to unitize their leases with small tracts upon which drilling permits had been granted. (S.F. 637, 644, 668)[2] Petitioners objected to the admission of evidence regarding such offers to unitize on the ground that such evidence was immaterial, because the owners of small tracts had a right as a matter of law to develop their tracts separately and such right could not be affected or limited by an offer of unitization on the part of another operator. (S.F. 638-644) The trial court sustained the objection (S.F. 644, 668) and such tendered evidence was included in the record only for the purpose of bills of exception to the trial court's ruling. (S.F. 644-645, 668)

The District Court having ruled that evidence regarding offers to unitize was immaterial, no evidence on that question was offered by the petitioners at the trial.

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[2] "S.F." references are to the Statement of Facts, being the stenographic report of the proceedings and evidence heard in the trial court, which by order of the Texas Supreme Court has been transmitted to this Court in original form.

The District Court entered judgment upholding the proration order of the Railroad Commission, adjudging it to be a valid and reasonable order, and denying respondent all relief. Appendix "F", infra, p. 82.

Upon direct appeal of this case, the Texas Supreme Court considered the evidence offered in the bills of exception regarding the offers to unitize, and held that because of such offers, petitioners were not in a position to complain because of the heavy financial loss which would result to them from a striking down of the 1/3 - 2/3 allocation formula contained in the Railroad Commission's proration order. The Supreme Court reversed the judgment below, one judge dissenting. (Appendix "G", infra, p. 87) However, the Texas Supreme Court did not remand the case to the District Court for a new trial, so that the question of offers to unitize could be developed and petitioners could have the opportunity to answer or explain evidence which respondents had tendered but which had been excluded by the District Court. Instead, the Texas Supreme Court rendered judgment against petitioners, cancelling the portion of the Railroad Commission's order allocating the allowable production on a 2/3 acreage - 1/3 per well basis. The concluding paragraphs of the opinion of the Texas Supreme Court are as follows (See Appendix "A", infra, pp. 47-48):

> "So far as the appellees' complaint that a striking down of the 1/3-2/3 formula would probably entail heavy financial loss to them, it may be said that they drilled their wells at their own risk. There is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source. While the

statute does not compel unitization, nevertheless it does expressly authorize that procedure subject to the approval of the Railroad Commission, Art. 6008b, V.A.C.S. It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying their properties and not for the purpose of enabling them to drain the minerals underlying adjoining lands to pay the cost of their operations plus profits. This does not mean and we are not to be understood as foreclosing the power of the Commission, by proper order or exception, to allow the holder of a Rule 37 permit[3] to recover a sufficient amount of oil or gas to repay drilling and production costs and provide a reasonable profit when no other means of recovering the minerals which underlie his land are available. No such problem is before us.

"From the foregoing it follows that the 1/3-2/3 proration formula as applied by the Commission in the Port Acres Field is invalid in that it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent. We hold that it is not reasonably supported by substantial evidence.

"The judgment of the trial court is reversed and judgment rendered for appellants."

The decision of the Texas Supreme Court, considering offers to unitize as material to the question of how much gas petitioners should be allowed to produce, was unexpected. In the companion case of *Halbouty v. Darsey*,

[3] The reference is to a drilling permit granted by the Railroad Commission to the lessee of a small tract which is not of such dimensions as to make it possible to drill a well at the distances from the property lines required by the spacing rule. Petitioners' wells were all drilled under such permits.

326 S.W. 2d 528 (Tex. Civ. App., writ refused, no reversible error, by Texas Supreme Court), it had been held, following numerous earlier Texas decisions, that offers to unitize did not prevent the Railroad Commission from granting the owners of small tracts in the Port Acres Field permits to drill on their tracts, even though such wells would drain large quantities of gas from adjacent tracts. See Appendix "C", infra, pp. 68-71.

In due time petitioners filed their motion for rehearing in which they urged the federal constitutional questions which are presented in this petition. See Appendix "D", infra, p. 73. The Texas Supreme Court overruled this motion. See Appendix "H", infra, p. 89. The assertion of the federal questions in the motion for rehearing in the Texas Supreme Court was sufficient and timely. *Saunders v. Shaw*, 244 U.S. 317; *Missouri ex rel. Missouri Insurance Co. v. Gebner*, 281 U.S. 313; *Grannis v. Ordean*, 234 U.S. 385; *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367.

While the majority of the Supreme Court of Texas did not write an opinion in overruling petitioners' Motion for Rehearing, Mr. Justice Smith, who was the second judge to disagree with the majority, wrote a dissenting opinion. See Appendix "B", infra, p. 49. The dissenting opinion point out (1) that the right of separate development of small tracts, theretofore unquestioned in Texas decisions, was destroyed and made futile by the majority decision that an offer to unitize, indicated by a bill of exception in the record in this case, required the Railroad Commission to deny a living allowable to wells drilled on separate small tracts, (2) that while the Texas statutes, Articles 6008b, Section 1, and Article 6014, paragraph (g), prohibit compulsory pooling, the majority opinion requires the Railroad

Commission to accomplish indirectly what they are forbidden to do directly, without any statutory procedure or standards being prescribed, (3) that the effect of the majority decision is to put the small tract owners at the mercy of large unit operators, since no definite standards are given for deciding the complex questions involved in unitization, and (4) that the majority decision, requiring the Railroad Commission to cut the allowables of petitioners' wells to where they can recover only a small fraction of their cash investment will mean the uncompensated loss to petitioners of millions of dollars in drilling costs alone.

## REASONS FOR THE ALLOWANCE OF THE WRIT

1. In refusing to remand the case for a new trial so that petitioners might have an opportunity to present their evidence on an issue which it considered to be material in determining the amount of production which the Railroad Commission of Texas could lawfully assign to petitioners, the Texas Supreme Court has denied to petitioners due process of law and has thereby deprived them of their property in violation of the Fourteenth Amendment to the United States Constitution. The holding of the Texas Supreme Court is in conflict with the decision of this Court in *Saunders v. Shau*, 244 U.S. 317.

In *Saunders v. Shau*, supra, as in this case, evidence, which was excluded on objection by the trial court, was considered by the State Supreme Court, which entered judgment based on such excluded evidence. The party who had made the objection to the evidence in the trial court and who had not offered any evidence on that issue because of the trial court's ruling that the evidence was inadmissible brought the case to this Court asserting "that

he had been deprived of due process of law; contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence." Upholding this position, this Court said (244 U.S. at 319, 320):

> "Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. . . . Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the cas was within the principle of the Myles Salt Co. Case that to remand it would be an empty form, —a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.
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> * * * *
>
> "The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation."

The ruling of the Texas Supreme Court in this case regarding the materiality of evidence of offers to unitize was the first time that such a holding had been made by any Texas court. The Court overturns what was regarded as settled law, for example, in the companion case of *Halbouty v. Darsey*, 326 S.W. 2d 528 (Tex. Civ. App., writ

refused, no reversible error, by Texas Supreme Court). See Appendix "C", infra, p. 64. That case was followed by the trial court in this case. Since the Texas Supreme Court has now decided that the law is otherwise, simple justice requires that petitioners, who have had no opportunity to present their side of the facts relating to the issue of unitization, should at least be granted a new trial in which they may offer their controverting evidence. The Texas Supreme Court has denied to petitioners their day in court, holding that as a matter of law petitioners have no right to complain because their investments, running into millions of dollars, will be destroyed. It is submitted that petitioners have plainly been denied due process of law.

2. The judgment of the Texas Supreme Court in this case requires the Railroad Commission of Texas, as a matter of law, to place stringent limitations upon the production by petitioners of gas from wells on their own separate gas leases, depending on whether or not petitioners "were offered unitization that would prevent confiscation and afford them a fair share of the mineral proceeds from the common source," but the Texas Supreme Court does not point out any statutory procedure or any reasonably definite or ascertainable standard by which it could be determined whether petitioners must accept such offers to unitize or run the risk of large financial losses if they decide to develop their properties separately. In placing this vague and ambiguous limitation upon the use by petitioners of their property, the Texas Supreme Court has deprived petitioners of their property without due process of law in violation of the Fourteenth Amendment. The decision of the Texas Supreme Court is in conflict with the principles announced and applied in *Champlin Refining Company v.*

*Corporation Commission*, 286 U.S. 210; *Sterling v. Constantin*, 287 U.S. 378; *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55; *Connally v. General Construction Company*, 269 U.S. 385; *Cramp v. Board of Public Instruction of Orange County, Florida* (December 11, 1961), —U.S.—, 82 S. Ct. 274.

The property rights of the owners of oil and gas lands in Texas, under the common law of this state, were succinctly and accurately stated by Mr. Justice Brandeis in the opinion of this Court in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 68:

> "Under it, the owner of land has title to oil and gas in place and, likewise, to the oil and gas which migrate to formations under his land through drainage from other lands. Under that rule, he may produce all the oil and gas that will flow out of the well on his land, subject to the exercise by other landowners of the same right of capture through drilling offsetting wells, so as to get their full share. This common-law rule, declared in an unbroken line of authorities, has been widely applied."

While the State of Texas through the reasonable exercise of its police power may regulate the common-law property rights of the owners of oil and gas lands for the purpose of conserving these natural resources, and concededly may regulate the drilling of gas wells and the amount of gas they may produce, in doing so the state must respect the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution. In striking down an attempt by the Governor of Texas to limit arbitrarily, and subject to no ascertainable standard, the pro-

duction of oil in the East Texas Field, this Court said in *Sterling v. Constantin*, 287 U.S. 378, 396:

> "The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties, subject to reasonable regulation by the state in the exercise of its power to prevent unnecessary loss, destruction, and waste, is protected by the due process clause of the Fourteenth Amendment."

It may be assumed that the Legislature of Texas could have compelled petitioners to unitize their tracts with adjoining owners by passing a statute establishing a procedure and setting out definite standards for unitization, to be enforced by some agency of the state, such as the Railroad Commission. Such a statute, adopted by the Oklahoma legislature, was upheld in *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376. The Texas legislature, however, has never seen fit to pass any such statute. The Texas Supreme Court in its opinion in this case concedes that "the statute does not compel unitization." Actually, the legislature has positively stated that the policy of the state is that no owner of oil or gas property shall be compelled to unitize or pool his property with the property of others. Section 1 of Article 6008b, *Vernon's Texas Civil Statutes* (Appendix "E", infra, p. 80), authorized unitization by voluntary agreement, but it expressly provides that "no person shall be compelled or required to enter into" a pooling or unitization agreement, and Article 6014, paragraph (g), *Vernon's Texas Civil Statutes* (Appendix "E", infra, p. 81), expressly provides that it is not the intent of the statute to require that "the separately owned properties in any pool be unitized under one management, control or ownership."

The substance and effect of the holding of the Texas Supreme Court in this case is that, in spite of express statutory provisions to the contrary, the Railroad Commission must exercise an implied authority to compel unitization indirectly by making it economically impossible for an owner of a small tract to develop his own separate tract independently, if he receives a "fair" offer to unitize his tract with other tracts. The decision of the Texas Supreme Court in this case is in conflict with the decisions of this Court holding that the regulation of property rights must not be on a basis which is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." See *Connally v. General Construction Company*, 269 U.S. 385, 391. The standard of "fairness" indicated by the opinion of the Texas Supreme Court in this case is far more vague and indefinite than the standards which were stricken down by this Court, as being in violation of the due process clause, in *Champlin Refining Company v. Corporation Commission*, 286 U.S. 210. In the *Champlin* case, there was at least an express statutory provision attempting to fix a standard, but this Court held that such standard was so ambiguous and indefinite as to constitute no guide or standard at all, and therefore that the attempted regulation was unconstitutional (286 U.S. at 243):

> "In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

In the present case, the statute makes no provision at all for compulsory pooling or unitization; to the contrary, the statutes expressly prohibit compulsory pooling or unitization. The authority to compel unitization by indirection is conferred on the Railroad Commission simply by the decision of the Texas Supreme Court in this case. The opinion of the Court gives no definite or ascertainable standard or rule whereby the fairness of a proposal to pool or unitize can be determined.

The matter of unitizing separately owned tracts within a common oil or gas reservoir is a complex and not a simple matter. For an illustration of the different factors properly to be considered in compelling the unitization of separate tracts, see the compulsory unitization statute of Oklahoma, Title 52, Chapter 3, Sections 287.1-287.15, *Oklahoma Statutes Annotated*, copied in the 1961 pocket part to Volume 5, Summers, "The Law of Oil and Gas," pages 239-246. For a plan of unitization, see the document copied in Myers, "The Law of Pooling and Unitization," Section 15.33, pages 592-627. It is obvious, from an examination of the Oklahoma statute and the unitization plan cited for purposes of illustration, that there is much room for wide differences of view as to what is "fair" in a unitization plan. Unless some legal procedure and some definite standards are legally provided, there will be no limitations on arbitrary action nor any guides by which the owners of small tracts can ascertain what their right would be.

Petitioners are just as much entitled to protection under the due process clause of the Fourteenth Amendment against a judgment of the court, reading into a statute a provision confiscating petitioners' property, as they are entitled to be protected against a statute expressly making

such provision. In *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 and 679, this Court said:

> "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. . . . The violation is nonetheless clear when the result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

3. The decision of the Texas Supreme Court is that petitioners drilled their wells "at their own risk" and that because petitioners guessed wrong on whether they should accept offers to unitize or go ahead and develop their tracts separately, they cannot complain because the striking down of the 1/3-2/3 formula will "entail heavy financial loss to them." See Appendix "A", infra, p. 47.

As we have pointed out, the Texas Supreme Court has denied a hearing to petitioners on the issue of unitization and has provided no definite standard whereby that issue could be determined. But even if a hearing may be granted and a standard can be assumed, still a state-imposed restriction on the use of petitioners' property which provides no procedur for a prior determination and puts on petitioners the burden of defending and justifying their decision against unitization at the risk of losing huge investments, denies to petitioners due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. A hearing where petitioners must run the risk of having their property confiscated if they guessed

wrong does not meet the tests of a fair hearing. There was no way whereby petitioners could get a judicial determination in advance as to whether they were right in deciding to spend millions of dollars in drilling their wells. A hearing only after such investment has been made, under the extreme peril of such heavy losses if the Court finds that petitioners guessed wrong, is in actual effect a denial of a fair hearing. For this additional reason the petitioners have been denied due process, under the principles announced and applied in *Oklahoma Operating Co. v. Love*, 252 U.S. 331; *Ex parte Young*, 209 U.S. 123; *Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165; *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340; *St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne*, 224 U.S. 354.

4. The holding of the Texas Supreme Court that the proration order of the Railroad Commission of Texas for the Port Acres Field is invalid, because small tract operators who have drilled wells under valid Railroad Commission permits in the field are not entitled to a rate or an allowable sufficient to provide them with any return on their investment, and that this is not a case in which the Railroad Commission can allow them a fair return on their investments that will enable them to get back their drilling costs, operating expenses, and only a reasonable profit within a reasonable time, is in violation of and contrary to the due process clause of the Fourteenth Amendment of the United States Constitution, which requires that when a regulatory body sets a return on an investment which has been authorized by a franchise or Railroad Commission permit, the return must be sufficient to pay costs and give a fair return on the investment.

The petitioners drilled under permits in the Port Acres Field, which have been validated and specifically upheld as necessary to prevent confiscation against the contention that they will under the 1/3-2/3 rule drain adjoining tracts in order to get a fair return on well investments. *Halbouty v. Darsey*, 326 S.W. 2d 528 (Tex. Civ. App., writ refused, no reversible error, by Texas Supreme Court). See Appendix "C", infra, p. 64.

The permits granted by the Railroad Commission to the petitioners to drill wells on their small tracts were in effect franchises which were accepted by petitioners' drilling wells thereon, and entitled the petitioners to produce gas from said wells under reasonable rules by the Railroad Commission. See *Humble Oil & Refining Co. v. Railroad Commission*, 94 S.W. 2d 1197, 1198 (Tex. Civ. App., writ of error refused by Texas Supreme Court); *Humble Oil & Refining Co. v. C. C. Cook, et al.*, 215 S.W. 2d 383, 386 (Tex. Civ. App., writ refused, no reversible error, by Texas Supreme Court).

The setting of rates or allowables so low that the petitioners cannot recover but a small fraction of their investment is confiscation of their permits and of their investments. See *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340; *United Railways & Electric Co. of Baltimore v. West*, 280 U.S. 234; *Smith v. Ames*, 169 U.S. 466.

The attempted withdrawal of said permits indirectly, by setting the allowables so low that the wells could not be operated at a profit, conflict with the due process clause and with the principles announced in *Northern Ohio Traction & Light Co. v. State of Ohio*, 245 U.S. 574, and cases cited therein.

## CONCLUSION

Petitioners recognize that this Court is not concerned with the correctness of the construction by the Texas Supreme Court of Texas statutes or even with its overturning of rules of property in oil and gas that were long regarded in Texas as settled law. Petitioners accept, as they must, the decision of the majority of the Texas Supreme Court as final on matters within the state's exclusive control. Petitioners' complaint here is that the direct result of that decision is that petitioners have had huge investments confiscated without due process, in violation of their rights under the Fourteenth Amendment to the United States Constitution, in that:

(1) petitioners have been denied a hearing on the crucial issue of unitization;

(2) no statutory or other reasonably definite standard is provided to determine whether offers of unitization must be accepted or rejected, leaving petitioners at the mercy of their competitors or subject to purely arbitrary decisions by state agencies;

(3) any hearing that may be allowed would not be a fair hearing, because it would be at the peril of having huge investments destroyed if a wrong guess has been made in rejecting offers to unitize, and

(4) petitioners' investments of millions of dollars, made under valid permits issued by the Texas Railroad Commission, will be destroyed because the allowable production will be fixed so low as to make it impossible even to pay drilling and operating costs, much less any profit.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be granted, and that the judgment of the Texas Supreme Court be reversed.

Respectfully submitted,

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I, Levert J. Able, attorney for Petitioners, depose and say that I have served copies of the foregoing Petition for Writ of Certiorari and the Appendix thereto, by mailing the same by United States Mail, Certified Mail, Return

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SUBSCRIBED AND SWORN to before me on this the 14 day of August, A. D. 1962.

J. Brunson

Notary Public in and for
Harris County, Texas

## APPENDIX "A"
### Majority Opinion of the Supreme Court of Texas

## IN THE SUPREME COURT OF TEXAS

NO. A-8200

| | | |
|---|---|---|
| MICHEL T. HALBOUTY, et al., Appellants, | § | On Direct Appeal |
| vs. | § | from Travis |
| RAILROAD COMMISSION OF TEXAS, et al., | § | County. |
| Appellees. | § | |

Michel T. Halbouty and others bring this direct appeal from a decree of the trial court upholding certain orders of the Railroad Commission of Texas and denying to the appellants a permanent injunction and all other relief prayed for.

In the trial court the appellants sought to restrain the Railroad Commission from continuing in effect the allocation formula adopted August 18, 1958, for the Port Acres Field in its order # 3-38,395 which reads as follows:

> "RULE 3. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production, after deductions have been made for wells which are incapable of producing their gas allowables, among the individual wells in the following manner:
>
> "(a) Two-thirds (2/3) of the allowed gas production from a non-associated gas reservoir shall be allocated to the individual wells completed therein in that proportion that the acreage assigned to each such well bears to the sum of the acreage in the reservoir.

"(b) One-third (1/3) of the allowed gas production from a non-associated gas reservoir shall be allocated equally among the individual wells completed therein.

"(c) The total daily non-associated gas allowable for each well shall be the sum of its acreage and per well allowables."

They also prayed that the Commission be further enjoined from allowing the marketing of gas from the Port Acres Field until the Commission required the operators in the field to maintain the pressure at such point as would permit the maximum recovery of hydrocarbons contained in the reservoir and to prevent unnecessary waste of those natural resources.

The trial court sustained exceptions to the pleadings in so far as they were directed to the refusal of the Railroad Commission to enter the compulsory cycling and pressure maintenance order and found and concluded that the order of the Commission otherwise complained of was reasonably sustained by substantial evidence and is lawful and valid.

At the outset the Railroad Commission and the other appellees vigorously challenge our jurisdiction of this direct appeal on the ground that such appeal will lie only where the purpose of the suit is to restrain action or threatened action on the part of the Commission and not when the object of the suit is to compel action. In other words they say that the real purpose and object of this suit is to compel the Railroad Commission to enter a new proration order and to order cycling and pressure maintenance in the Port Acres Field.

To support their position in this respect they rely on our decision in Boston v. Garrison, 152 Tex. 253, 256

S.W. 2d 67. That suit as first filed sought to restrain the officials of the Department of Public Safety from suspending a chauffeur's license. Prior to the trial the license had expired and plaintiff, by an amendment to his petition, sought to compel the department to renew the old or issue a new license. We held that a direct appeal would not lie in that respect and that his only redress was in the nature of a mandamus. We did not hold that we would not have jurisdiction of the appeal from the refusal of the trial court to restrain the department from suspending the license but that matter had become moot.

In the case here the appellants assert that the proration formula of one-third and two-thirds is unjustified, unreasonable and invalid and of that issue we do have jurisdiction. Incidentally, a striking down of this proration order would, in the natural course of things, enjoin upon the Railroad Commission the duty to write a new order, but it is not within the scope of our jurisdiction here to direct the Commission in that regard. What we have before us is the validity vel non of the order as written. Railroad Commission v. Sterling Oil & Refining Co., 147 Tex. 547, 218 S.W. 2d 415; Board of Water Engineers v. Colorado River Municipal Water District, 152 Tex. 77, 254 S.W. 2d 369; Texas & N.O. Ry. Co. v. Railroad Commission, 155 Tex. 323, 286 S.W. 2d 112; Railroad Commission v. Shell Oil Co., 146 Tex. 286, 206 S.W 2d 235.

Article 1738a, Vernon's Ann. Civ. Stat., reads in part as follows:

> "* * * appeals may be taken direct to the Supreme Court of this State from any order of any trial court granting or denying an interlocutory or permanent

> injunction * * * on the ground of the validity or invalidity of any administrative order issued by any State Board of Commission under any statute of this State. * * *."

The article further provides that the Supreme Court shall prescribe the necessary procedural rules to be followed in perfecting such appeal. Pursuant to that directive, Rule 499-a was adopted.

In Atlantic Refining Co. v. Railroad Commission of Texas, ___Tex.___, 346 S.W. 2d 801, our jurisdiction of the direct appeal was attacked and while we did not there discuss the question of jurisdiction that decision by implication holds contrary to appellees' contention.

In so far as appellants complain of the refusal of the Railroad Commission to require compulsory cycling and pressure maintenance in this field is concerned, we do not have jurisdiction of the appeal. The jurisdiction of the Supreme Court on direct appeal is dependent upon and limited to the wording of the Constitutional Amendment, Art. 5 § 3b, and Art. 1738a, Vernon's Ann. Civ. Stat. While in the trial court appellants prayed for an injunction to restrain the Commission "from approving or allowing the withdrawals of gas to market from the Port Acres Field in such quantity and under such conditions as will result in the preventable waste of the hydrocarbon content of such gas until such time as the Commission has duly entered an order or orders requiring the operators in such field to maintain the pressure in the field at a point which will permit the maximum recovery of the hydrocarbons contained in the reservoir to the end that preventable waste of such natural resources shall be prevented," nevertheless the actual relief sought was to require the Commission

to enter a compulsory cycling and pressure maintenance order. It was so considered and treated by the Commission.

These proceedings were instituted before the Commission in the following manner: On November 19th, three months after the adoption of Special Order No. 3-38,395, Peter Henderson Oil Company requested that the Commission hold a hearing to reconsider and amend Rule 3 thereof. Notice was given that the hearing was set for January 27, 1959. On January 22nd Halbouty and Meredith joined in the Henderson Company request and asked that the issues be broadened to include the question of whether recycling or other secondary recovery operations should be instituted and conducted. On January 23rd Pan American joined in the Halbouty-Meredith request. On July 6, 1959, after hearing and consideration, the Commission notified all parties of its action as follows:

> "This is to advise that the Commission, at a formal conference held July 6, 1959, denied your applicaton for a mandatory cycling order for the Port Acres (Lower Backberry) Field, Jefferson County, Texas.
>
> "The Commission further denied your application for an allocation formula based on net acre feet for the subject field and ruled that the allocation fomula based on 2/3 acreage and 1/3 per well shall continue to remain in effect."

In Boston v. Garrison et al., supra, under the direct appeal provision it was pointed out that the Supreme Court does not have jurisdiction where the purpose of the suit is to require or to compel action although the relator prayed "that mandatory injunction shall issue requiring the defendants to issue plaintiff renewal license or provisional license." That in effect was an application for mandamus to compel the department to issue the license.

In Lane v. Ross, 151 Tex. 268, 249 S.W. 2d 591, the relators prayed that the respondent be ordered and commanded not to transmit to the chairman of a state political committee certain minutes and returns of election and that the respondent be ordered to transmit certain other minutes and returns. We held that in this original action this court did have jurisdiction to issue a writ of mandamus but no jurisdiction to grant injunctive relief and since there appeared to be no need for issuance of the mandamus the petition was dismissed.

In Boston v. Garrison we said:

> "* * * In that case [Lane v. Ross] there was jurisdiction to issue the writ of mandamus but no jurisdiction to issue a writ of injunction, and because of the want of jurisdiction the injunctive relief was denied. Here, assuming that constitutionality or validity is properly involved, the court has jurisdiction on direct appeal from an order or judgment granting or denying an injunction, but no jurisdiction on direct appeal from an order or judgment granting or denying mandamus."

So here an application to restrain the Commission from allowing gas to be marketed until the Commission has entered an order requiring recycling of gas is the equivalent of an application to have the court compel the Commission to enter the recycling order. The appeal to the district court lay from two separate and distinct and severable orders of the Commission. A combination of the two complaints in one cause would not serve to give us jurisdiction where otherwise it would not attach.

It appears that the Port Acres Field produces only gas and condensate. It embraces an area of approximately 3,000

acres. The discovery well was completed in 1957. The production is from sands at a depth of something over 10,000 feet. The Commission, in its special order for this field adopted the following spacing rule:

> "Rule 1. No gas well shall hereafter be drilled nearer than thirteen hundred and twenty (1320) feet to any well completed in or drilling to the same reservoir on the same lease, unitized tract or farm, and no well shall be drilled nearer than three hundred and thirty (330) feet to any property line, lease line or subdivision line; provided, however, that the Commission will, in order to prevent waste or to prevent the confiscation of property grant exceptions to permit drilling within shorter distances than herein prescribed whenever the Commission shall have determined that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When exception to this rule is desired, application therefor shall be filed and will be acted upon in accordance with the provisions of Commission State-wide Rules 37 and 38, which applicable provisions of said rules are incorporated herein by reference.
>
> "The aforementioned distances in the above rule are mimmum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each one hundred and sixty (160) acre proration unit."

Thus the Commission determined that one well to 160 acres would effectively recover all of the hydrocarbons contained in the field reservoir.

At the time of the trial there were said to be 25 producing wells on large units or tracts and 22 producing wells drilled under permits issued as exceptions to Rule 37.

This suit was brought by Pan American Petroleum Corporation, Michel Halbouty and Meredith and Company. Peter Henderson Oil Company intervened and these four are appellants. A number of the small tract owners intervened and aligned themselves with the Commission. They are H. L. Dillon, Jr., H. C. Barnes, Tyreil-Combest Realty Company and P. G. Lake, Inc. Most of the small tract owners in this field have entered into unitization agreements. For instance, the Peter Henderson Oil Company units, three in number, consist of several hundred small tracts. The 22 Rule 37 wells are situated on tracts ranging from 2/10ths of an acre up to 5 acres; 16 embraced less than one acre and 10 less than one-half acre.

The principal contention urged by the appellants is to the effect that the proration formula in this field allocating production on a basis of one-third per well and two-thirds on the amount of acreage in the tract is not reasonably sustained by substantial evidence, but on the other hand is arbitrary, unreasonable and confiscatory of appellants' property. Under the record before us we are of the opinion that this case is controlled by our recent decision in Atlantic Refining Co. v. Railroad Commission, ____ Tex.____, 346 S.W. 2d 801 (hereinafter referred to as Normanna) and the point is therefore sustained.

The Attorney General in his brief for the Railroad Commission squarely points up the real issue before us that goes to the heart of this case. He says "that townsite operators do have a property right in the reserves underlying the large tract owners, and that that right extends to the right to drain enough oil or gas from other tracts in the field to yield a reasonable opportunity for a profit to the operator." The other appellees also assert that right.

In other words, since the owner of a tract, no matter how small, is entitled to one well to prevent the confiscation of the gas underlying his tract, he, therefore, becomes entitled to confiscate gas from adjacent properties sufficient to pay the cost of his drilling operations and return a reasonable profit. In support of that proposition he cites only Railroad Commission v. Humble Oil & Refining Co., Tex. Civ. App., 193 S.W. 2d 824, wr. ref. n.r.e., [the Hawkins case] where the following statement is to be found:

> "As a corollary to these rules, it is held that the owner of an 'involuntary' segregated tract cannot be denied the right to drill at least one well on his tract however small it may be. From which it would seem that his allowable can not be cut down to the point where his well would no longer produce, (See Railroad Commission v. Mackhank, Tex. Sup., 190 S.W. 2d 802) nor below the point where it could not be drilled and operated at a reasonable profit." (No authority is cited in support of the latter conclusion).

In the Mackhank case the only proposition decided by this court was that there was substantial evidence reasonably supporting the conclusion that in order to prevent waste it was necessary to keep the two wells on production and the order was therefore not invalid. The Mackhank decision can in no way be construed as authority for a rule that would require allowable production sufficient to return the cost of the well and its operation plus a reasonable profit. The conservation statutes nowhere suggest such a factor. We find nothing in the law to justify that proposition.

In the Hawkins case the testimony was that Humble's properties contained 76.5 per cent of the recoverable

reserves of the entire field and under the effective proration order it was allowed to produce only 71.4 per cent and this, if continued for the estimated life of the field, some 27 years, would result in drainage from the Humble's properties to the Townsite section of some thirty million barrels of Humble's oil. Some witnesses, on the other hand, testified that the productive life of the Townsite 73.74 acres would be shortened below that of the remainder of the field by some ten years on account of its position on the structure and the heavy withdrawals. Another witness testified that in his opinion if production were unrestricted the town lot wells would produce more oil than under the proration order then in effect. The court pointed out other considerations and factors which served to support the reasonableness of the Commission's order.

The Hawkins case goes further to state the accepted rule which is contradictory of any theory that the allowable must be fixed on a cost plus profit basis, namely, "In the exercise of this rule of curtailment it is generally recognized that the rules and regulations adopted must, as far as practical, and within reasonable limitations afford the several property owners a fair opportunity to produce the recoverable oil underlying their lands or its equivalent. This rule had theretofore been firmly established in our jurisdiction.

In Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73 (1939), we held:

> "* * * It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S.W. 2d 1240, writ refused. * * *."

Again in Trapp v. Atlantic Refining Co., Tex. Civ. App., 169 S.W. 2d 797, wr. ref., it is said:

> "* * * The uniform holding has been that the criterion implicit in this exception is whether the well is necessary to protect the owner in his right to obtain his fair share (or the equivalent thereof) of the recoverable oil underlying his land. Both of these exceptions were discussed and upheld in Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73. Since the issue raised in this contention has been so conclusively adjudicated, its discussion as an original proposition is both unnecessary and undesirable."

The Legislature announced a declaration of policy in the production and use of natural gas in § 1, Art. 6008 as follows:

> "In recognition of past, present, and imminent evils occurring in the production and use of natural gas as a result of waste in the production and use thereof, in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production."

In Corzelius v. Harrell, 143 Tex. 508, 186 S.W. 2d 961, we quoted with approval the language used by the United States Supreme Court in Thompson v. Consolidated Gas Corporation, 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510:

> "* * * It may be assumed that House Bill 266 [Art. 6008] should be construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas

to their justly proportionate shares thereof, free of drainage to neighboring lands. * * *."

In Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W. 2d 941, we held that "Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns; and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation."

As pointed out in Normanna we also held in the Marrs case that the allowables fixed for the two separate areas were entirely out of proportion to the potentials and would result in the taking of one man's property and giving it to another. Although the Marrs case rejected the substantial evidence rule; nevertheless that is not to say that the rules of law otherwise announced by that decision are wrong or have been overruled by later decisions of this court.

In the case presently before us the basic facts are not substantially in dispute. The contentions arise over conclusions to be drawn from those facts. From the testimony of Dillon's witness, the only witness offered by any of the appellees, it appears that a 1-acre tract under the 1/3 - 2/3 formula would have a total gross income from April 1, 1960, to the end of its productive period of $407,501.00. The total cost of such a well, including drilling, operating, and royalty expenses, would be $361,674.00, leaving a net profit of $45,827.00. The same testimony shows that under a formula based on acre feet of producing sand, each 1-acre tract even without prior production would have only

a total gross income of $50,867.00. This witness further testified that the total hydrocarbon recovery from each 1-acre tract under the 1/3-2/3 formula would be 1,542,987 MCF of gas and 69,358 barrels of condensate. That of this total recovery, 1,432,987 MCF of gas and 62,858 barrels of condensate would be contributed by drainage. In other words, each 1-acre lot depends upon drainage for 92.87% of its gas discovery and 90.63% of its condensate recovery.

The witness further testified that the estimated field capability is 165,932,900 MCF of gas and 7,458,732 barrels of condensate; that the 22 small tract wells combined would recover 33,945,714 MCF of gas and 1,525,876 barrels of condensate. This witness estimates a total of 116,063 acre feet of producing sand in the Port Acres Field and he assigns 2,050 acre feet of this total or 1.77% to the 22 Rule 37 tracts. According to his figures, these small tracts with 1.77% of the producing sand would under the 1/3-2/3 formula recover 20.46% of the field's total gas and condensate potential.

Petitioner's exhibit from the Railroad Commission allowable schedule for September, 1960, shows 20 Rule 37 wells with a total allowable of 193,599 MCF of gas. Twenty-five wells on normal 160-acre proration units (some being less than 160 acres) are allowed to produce 1,116,416 MCF of gas. The tracts on which the 20 Rule 37 wells are situated comprise only 19.89 acres, while the 25 regular wells are located on 3,036 acres. Thus, on a productive acre basis, the 20 wells having .65% of the total acreage receive 14.6% of the allowable.

By way of comparison between the well on one of the largest producing units and the well on one of the smallest units, the following table is constructed from the testimony of the appellees' witness:

| Surface Acreage | | Monthly Allowable (MCF) | Average |
|---|---|---|---|
| Pan American Ward | 176.00 | 48,587 | 276.06 MCF per acre |
| Thompson-Sassine | 25 | 9,515 | 38,060.00 MCF per acre |
| **Acre-Feet of Sand** | | | |
| Pan American Ward | 19,851.0 | 48,587 | 4,932 MCF per acre foot |
| Thompson-Sassine | 17.8 | 9,515 | 534,551 MCF per acre foot |

Thus, on the basis of the present proration order the well on the one-fourth acre tract is allowed to produce 137 times as much gas pet acre as the well on 176 acres and 107 times more per acre foot of producing sand.

Article 6008, § 12, Vernon's Ann. Civ. Stat., provides that the Commission shall proceed to regulate and prorate gas production in the reservoir "on a reasonable basis". The Article further provides that "the monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste." Section 12 of that statute provides that the Commission shall take into account in fixing the daily allowable production for each gas well the size of the tract, the relation between the daily producing capacity and the aggregate daily capacity of all gas wells and all other factors which are pertinent.

The appellees offered some testimony that there is potentially a water drive from the east to the west that would result in longer and greater production in the western portion of the field where the Rule 37 wells are located, the theory being that this water drive would limit and flood out the eastern wells forcing the gas westward into the higher structure where the Henderson Rule 37 wells are located, thus compensating Henderson at least in part for the drainage loss. On the other hand the appellants' wit-

nesses emphatically assert that there is presently no water drive and deny that there is any indication of such occurrence in the future. We understand from the testimony that no water drive has yet occurred that has resulted in any loss to or flooding of the wells to the east where the drive would first be felt. Admittedly these Rule 37 wells are located in the area where the producing sand stratum is thicker and the structure is higher. In our opinion neither of these factors offer any comfort to the Rule 37 appellees because their tracts are almost completely surrounded by and lie within the confines of the Peter Henderson oil units and will necessarily drain from those units. There is testimony in the record that Halbouty and Meredith under the 1/3-2/3 formula will eventually produce substantially all of the gas estimated to underlie their land, but this fact does not tend to make the formula a reasonable one as between the Rule 37 wells and Henderson.

In making a comparison between the Peter Henderson units and the 20 Rule 37 wells[4] we use the testimony of appellees' witness. The Henderson units comprise 520.3 acres or 19.84% of the total field acreage and have 16.13% of the total field allowable while the 20 Rule 37 wells have a total of 19.88 acres or .76% of the total acreage and receive 14.78% of the total allowable.

From the testimony of the same witness it appears that Peter Henderson has 33,807 acre feet or 29.37% of the total acre feet in the field, while the 20 Rule 37 wells have only 1,957 or 1.70% of the total.

The appellees urge that this case is distinguishable from Normanna on the facts and therefore the latter should not control. (1) They say the Normanna Field had not been

[4] Only wells on October, 1960, Proration Schedule are used.

substantially developed, whereas the Port Acres Field is well developed. While this is true, that fact would appear to militate in favor of the appellants rather than of the appellees because the greater the development and the more accurate the obtainable geological information, the less justification can be found for applying the standard 1/3-2/3 proration formula. (2) They maintain that the allocation formula here is beneficial to some of the large tract producers and does not deprive them of any property rights. Although there is evidence that some of these producers, due to early production, or for other reasons, may recover 100% or more of their reserves in place, it is clear, however, that at least one of them, Henderson Oil Company, whose large units are composed of unitized small tracts, will suffer loss from drainage to the Rule 37 wells. (3) They say as contrasted with Normanna this is not solely a case of large tracts against small ones because Henderson makes the contention that the formula is inequitable as among the large tracts. We fail to see how this would make a material distinction, although the case here is principally one of small tracts that have been unitized against small tracts whose owners have preferred not to unitize. In Normanna we were concerned with only one small tract. Here 40 permits have been granted to drill small tracts of which there are 500 in the field, presenting a much more serious problem so far as orderly economical development is concerned.

Another point of distinction urged is that in Normanna the attack was made against the 1/3-2/3 formula while in this case the appellants asked the Commission to enter their "recommended order" in lieu of the 1/3-2/3 proration order. In other words they say that by the terms of appellants' application the Commission was limited to an ac-

ceptance or rejection of the recommended order in that the appellants asked for no other relief than on a "take it or leave it" basis. They argue that there is a great difference procedurally between an application to enter a specific order and one claiming that the rule in effect is unduly harmful and requesting the Commission to rescind that rule and enter one that is fair and in its stead.

We do not so construe the proceedings in this case nor evidently did the Commission. Henderson's application reads "On behalf of Peter Henderson Oil Company we wish to request a hearing to reconsider and amend Rule 3 of the special order adopting rules and regulations for the Port Acres [Lower Hackberry] Field of Jefferson County, Texas." At the time of filing of Henderson's application, November 19, 1958, only one permit to drill in this field as an exception to Rule 37 had been requested and it was not granted until December 22, 1958. The notice of the hearing issued by the Commission recited that the hearing would be held for the purpose of considering the application of Peter Henderson Oil Company and concluded as follows: "Pursuant to said Hearing the Commission will enter such rules, regulations, and orders as in its judgment the evidence presented may justify."

In Henderson's motion to the Commission for rehearing it is argued that the present formula is unjust and unfair and does not allow to all parties a fair opportunity to have and produce their fair share of the gas and condensate from the reservoir. In that connection the motion urges the Commission to take into consideration the variation of the sand thickness, the size of the tracts, the drainage from the thick sand portion of the field into the thin sand and all other pertinent factors shown by the evidence to exist.

It is also argued that if the per well factor is retained it should be substantially less than one-third.

The proceedings before the Railroad Commission are informal and their validity will not be tested by the technical rules of pleadings and practice that obtain in court trials. Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W. 2d 967; Cook Drilling Co. v. Gulf Oil Corporation, 139 Tex. 80, 161 S.W. 2d 1035.

The fact that appellants suggested and urged upon the Commission that the proration formula should limit recovery substantially to the reserves in place beneath each tract does not foreclose their right to complain of the formula which they considered inequitable and confiscatory of their property nor does it limit the Commission solely to the option of either accepting or rejecting the proposed formula in toto. All parties, of course, concede that the court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors. We are limited to passing upon the validity of the order as promulgated.

The appellees, in seeking to uphold the proration formula adopted by the Commission, discuss at considerable length the so-called "rule of capture" and claim some benefit or protection under that rule. They cite among other cases Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. 2d 935, 87 S.W. 2d 1069; Corzelius v. Harrell, 143 Tex. 509, 186 S.W. 2d 961; Ryan Consolidated Petroleum Corporation v. Pickens, 155 Tex. 221, 285 S.W. 2d 201. The doctrine of these cases is stated in Corzelius as follows:

> "The rule in this State recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein. It is also held that such rule should

> be considered in connection with the law of capture, which is recognized as a property right and both rules are subject to regulation under the police power of this State."

Somewhat more positively we said in Elliff v. Texon Drilling Company (1948), 146 Tex. 575, 210 S.W. 2d 558, 44 A.L.R. 2d 191,[2] that:

> "In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations."

In Ryan v. Pickens it is stated that "The courts of Texas have consistently held that the rule of capture is still in force in this State. It has become a vested property right." That is not to say, however, that the rule of capture is unlimited or not modified by the accompanying rule recognized by all the cases and stated in the *Ryan* case as follows:

> "* * * Here [in Texas] oil and gas in place are by the established rules of property a part of the realty or corpus of the land, and subject to ownership, severance, conveyance, lease and taxation as such. * * * *."

The very fact that the Commission has the right to limit production on the basis of acreage is a recognition of that

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[2] See also cases cited:
**Lemar v. Garner**, 121 Tex. 502, 50 S.W.2d 769; **Humphreys-Mexia Co. v. Cannon**, 113 Tex. 247, 254 S.W. 296, 29 A.L.R. 607; **Waggoner Estate v. Sigler Oil Co.**, 118 Tex. 509, 19 S.W.2d 27; **Texas Co. v. Daugherty**, 107 Tex. 226, 176 S.W. 717, L.R.A. 1917F, 980.

principle. If the Commission has the legal right, which they formerly exercised, to fix a proration formula based one-half per well and one-half on the amount of acreage, and as now generally practiced of basing the allowable 1/3 on the well and 2/3 on the acreage, then there is nothing in the rule of capture that would make it illegal for the Commission in the exercise of its sound judgment and discretion now to give greater or less weight to the well or acreage factors or for that matter to the amount of reserves in place or any other field factors as provided by the statute.

It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land.

As to the right of capture, appellees refer to the following statement in Brown v. Humble Oil & Refining Co., 126 Tex. 297, 83 S.W. 2d 935, 87 S.W. 2d 1096:

> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that was flowing out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one's land by the exercise of the same right of capture. The following decisions discuss the law of capture as applied in this State: Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; H. & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 66 L.R.A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; Prairie Oil & Gas Co. v. State (Tex.

Com. App.) 231 S.W. 1088, 1089. Both rules are subject to regulation under the police power of a state."

The court seems here to be merely stating what the rule of capture is if unlimited by correlative rights, for in the preceding paragraph the court expressly reaffirms that in Texas the law recognizes the ownership of oil and gas in place and gives to the lessee a determinable fee therein.

To infer that the rule of capture gives to the landowner the legally protected right to capture the oil and gas underlying his neighbor's tract is entirely inconsistent with the ownership theory. To harmonize both rules, the rule of capture can mean little more than that due to their fugitive nature, the hydrocarbons when captured belong to the owner of the well to which they flowed, irrespective of where they may have been in place originally, without liability to his neighbor for drainage. That is to say that since the gas in a continuous reservoir will flow to a point of low pressure the landowner is not restricted to the particular gas that may underlie his property originally but is the owner of all that which he may legally recover. This seems to be substantially the view expresed in Brown v. Humble, supra.

In Stephens v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566, it was determined that the rule of capture does not conflict with the view of absolute ownership of the minerals in place and we quote: "If the owners of adjacant lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative rights to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own." In the Port

Acres Field under the application of the existing proration formula Henderson does not enjoy any correlative rights so far as the small tract wells are concerned since there can be no compensatory drainage to Henderson from the small tracts.

In Normanna the evidence shows that the 1/3-2/3 formula would result in the drainage of a tremendous quantity of gas and condensate from other leases in the field to the .3-acre lease in question, though the precise amount of drainage was incapable of ascertainment, and of course such drainage could not be compensated by drainage from the .3-acre tract to other leases in the field. The evidence further showed that the order would allow the well on the .3-acre tract to produce at a rate of over 200 times as much gas per acre as a well on the 320-acre unit established by the spacing pattern. We think the evidence here is comparable to that in Normanna. Under the order adopted in the Port Acres Field more than 90% of the hydrocarbons recovered by the Rule 37 wells would be drained from other leases in the field. As said in Normanna the proration formula adopted here of 1/3-2/3 does not come close to compelling ratable production nor afford to each producer in the field an opportunity to produce his fair share of gas from the reservoir.

We fully appreciate the thorny problem that the Commission has in this matter of proration among the hundreds of fields under their supervision with different characteristics and the diverse conflicting interests, views and opinions but we are confident that with the trained personnel at their disposal a much nearer approximation can be made, giving to all parties an opportunity to produce a fair share of the minerals underlying the field with ratable allowables that will be more nearly equitable than appears in the

case before us. As long ago as 1935 we said in the Brown v. Humble Oil & Refining Company case:

> "* * * It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions."

So far as the appellees' complaint that a striking down of the 1/3-2/3 formula would probably entail heavy financial loss to them, it may be said that they drilled their wells at their own risk. There is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source. While the statute does not compel unitization, nevertheless it does expressly authorize that procedure subject to the approval of the Railroad Commission, Art. 6008b, V.A.C.S. It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying their properties and not for the purpose of enabling them to drain the minerals underlying adjoining lands to pay the cost of their operations plus profits. This does not mean and we are not to be understood as foreclosing the power of the Commission, by proper order or exception, to allow the holder of a Rule 37 permit to recover a sufficient amount of oil or gas to repay drilling and production costs and provide a reasonable profit when no other means of recovering the minerals which underlie his land are available. No such problem is before us.

From the foregoing it follows that the 1/3-2/3 proration formula as applied by the Commission in the Port Acres Field is invalid in that it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent. We hold that it is not reasonably supported by substantial evidence.

The judgmen of the trial court is reversed and judgment rendered for appellants.

Frank P. Culver, Jr.
*Associate Justice*

Associate Justice Griffin dissents.

FPC:A
Opinion delivered:
February 14, 1962

## APPENDIX "B"

### Dissenting Opinion of Associate Justice Smith

### IN THE SUPREME COURT OF TEXAS

NO. A-8200

| | | |
|---|---|---|
| MICHEL T. HALBOUTY, et al., Appellants, | § | On Direct Appeal |
| v. | § | |
| RAILROAD COMMISSION OF TEXAS, et al., Appellees. | § | from Travis County. |

### DISSENTING OPINION ON MOTION FOR REHEARING

I respectfully dissent. Upon further consideration, I find that to agree with the majority would place me in a completely inconsistent position with that of former decisions of this Court, especially those wherein I was the author of the majority opinion. This is especially true when considered in the light of the decisions in Ryan Consolidated Petroleum Corporation v. Pickens, 155 Tex. 224, 285 S.W. 2d 201, and other cases discussed herein. Not only that, the majority opinion bears out my fear that the Normanna decision was the opening wedge to compulsory pooling by judicial decree. See my dissent in Atlantic Refining Company v. Railroad Commission, Tex. , 346 S.W. 2d 801. However, expressions in the majority opinion in that case lead me to think that possibly the holding announced by the majority only applied to that particular case. I am inclined to believe that many of the oil and gas attorneys were of a similar view. When I wrote the dissent in Normanna, it was my deliberate purpose to guard against compulsory pooling by judicial decree. I find the Court now following the advocates of compulsory pooling in the pres-

ent case, although the Normanna case did not actually deny the right of separate development to owners of small tracts. I am now convinced that the Halbouty decision effectually denies such right and apparently authorizes compulsory pooling without any legislative authorization.

The right of separate development of small tracts has long been recognized by the Texas courts. In fact, it has become a settled rule of property. The fact that the rule was announced in so-called Rule 37 cases does not mean that such rule is confined in application to such cases.

The Railroad Commission of Texas has in the past rigidly followed the law as announced by this Court in Ryan and other cases and has adopted rules consistent with the principles of law announced in cases prior to Normanna. The Railroad Commission steadfastly adhered to the law and has awaited action of the Legislature, the only department of government that has the legal power to compel compulsory pooling.

After the Normanna decision, the Railroad Commission was confronted with the difficult task of adopting rules and regulations for the Normanna Fields. The Railroad Commission obviously reached the conclusion that the Normanna decision could mean nothing other than compulsory pooling. On September 27, 1961, the Railroad Commission adopted new rules for the Normanna Fields. The Commission in its order took cognizance of two short paragraphs in the Normanna opinion wherein the Court said that the 2/3-1/3 rule did not come close[1] to compelling ratable

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1 "It does not come close to compelling ratable production; neither does it offer each producer in the field an opportunity to produce his fair share of the gas from the reservoir."

production and that the responsibility was upon the Commission to devise some rule of proration which would conserve the gas in the field in question and at the same time be fair and just to all parties.

It should be noted that the Normanna opinion carefully avoided specifically directing the Railroad Commission to adopt a rule encompassing compulsory pooling. In fact, it gave no specific direction in this respect. However, the Commission was of the opinion[2] that compulsory pooling was demanded by the Normanna decision. Rule 3b[3] and

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[2] "The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property."

[3] "WHEREAS, From a study of the full record adduced at said hearing, which included technical, reservoir data and legal briefs submitted by the several interested parties, the Commission is of the opinion and finds that an acreage allocation formula would reasonably provide each party an opportunity to produce its fair share of the gas in a reservoir, but because of the additional responsibility placed upon the Commission, that is, to arrive at a means of preventing confiscation of a small tract's reserves while allowing each operator to produce its fair share of the gas in a reservoir, as knotty a problem as has ever been placed before the Commission, must be solved, that such solution in all probability is best resolved through the use of a special allowable that would encourage a small tract owner to negotiate with his neighbors for fair and just treatment, but would also provide a sufficient allowable to such small tract to encourage a reasonable attitude in such neighbors so that they would endeavor to work out this common problem. . . ."

[4] "Rule 3b. Any operator having the right to drill a gas well upon a tract containing less than 100 acres, after application, notice and hearing prior to the drilling of the well, may, if in the judgment of the Commission the facts so justify, be given a definite and fixed special allowable, provided the well is completed as a producing well, higher than the allowable that would be fixed for any well completed upon such tract by reference to said allocation formula upon proof to the Com-

other provisions in the special order issued on September 27, 1961, strongly indicate that the Commission felt that this Court had by the Normanna decision released the Commission from the duty of following the well-settled rules of property which had been firmly announced by this Court in the decisions hereinafter cited.

The Halbouty decision confirms the action of the Commission of September, 1961. In other words, Halbouty said, in effect, to the Commission that it correctly concluded, in adopting the September, 1961 rules, that it had the authority under the Normanna decision to fix an allowable for wells on small tracts in the absence of statutes providing for compulsory pooling.

The Halbouty decision falls in line with the advocates of compulsory pooling and for the first time informs the litigants as to what the majority really had in mind when

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mission (1) that the drilling and completion of a well upon said tract is not economically feasible; and (2) that each and every owner of the right to drill upon acreage immediately adjacent to said tract of less than 100 acres has refused to allow the pooling of said tract with enough of said immediately adjacent acreage to create a drilling unit of at least 100 acres upon fair and reasonable terms; that is, upon such terms as would allow the owners to drill, complete and operate the well to be drilled thereon and as would provide that all income received from 7/8ths of the production from said well and all expense of drilling, completing and operating said well should be shared among the owners of the working interest in said drill-site unit upon an acreage basis. Such special allowable shall control the production of gas from said well during its producing life, except that said allowable shall be related properly to total field production as the same may fluctuate and said special allowable, if granted, shall in no event exceed the allowable of a gas well completed on a tract containing 100 productive acres; provided further, however, that any well drilled before the adoption of this rule will be treated, for purposes of this rule, as though it had not yet been drilled."

it wrote the Normanna decision. However, I wish to point out that even after Normanna, the advocates of compulsory pooling recognized that the Texas courts had definitely established the right of separate development. May I digress to say that we do not have before us here the question of whether or not the property rule prevailing in Texas has caused gross inequities. The question is: Are we going to depart from the Court's consistent adherence to the rule that a tract, no matter how small, is entitled to one well as a mater of right unless the tract is a part of a voluntary subdivision, and that the Legislature is the only body that can bring about compulsory pooling? It is well recognized that the Texas rule of property stands for the proposition that in Texas, the owner of a small tract is entitled to one well as a matter of right and that to limit the allowable for that well to a figure commensurate with the recoverable *oil and gas in place beneath the tract* would make the well an unprofitable one and his right to drill a well on his tract would be a futile thing. This rule of property has been completely destroyed by the Halbouty decision, particularly when this Court said:

> "So far as the appellees' complaint that a striking down of the 1/3-2/3 formula would probably entail heavy financial loss to them, it may be said that they drilled their wells at their own risk. There is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source. * * *"

Clearly, without statutory standards, the Railroad Commission cannot adequately exercise the power of compulsory pooling now given to it by Halbouty. On the other hand,

the owner of small tracts are left at the mercy of the standards fixed by the owners occupying the position of Halbouty and Henderson - this, without regard to whether the small tract owners are wealthy, middle class, or poor.

In this case, the offers to pool made by Halbouty and Henderson are most indefinite, this because there exists no legislative guide fixing the standards for determining how expenses and revenue is to be shared. Each operator who is fortunate enough to have gotten together several small tracts is left to make his own ground rules. This cannot be sound. For example, in this case, Halbouty offered to pool and unitize his leases with others, but all that his offer said on the subject of expenses was that Halbouty will "pay and bear his ratable share of the cost of drilling and operating costs." I think Dillon's argument on this particular phase of the case is sound and I quote:

> "Does 'ratable' mean on the basis of surface acreage? If so, it would obviously be an unfair basis of pooling or unitization, if the thin leases of Halbouty on the east were unitized with tracts in the center of the field having very thick and productive sands. Or, on the other hand, does 'ratable' mean that the costs and revenue would be divided on the basis of estimated acre feet of net productive sand? If so, whose estimate is to be taken as the criterion? Must the Railroad Commission set up a schedule of acre feet, resolving the tremendous conflicts between experts as to how many acre feet are beneath the various tracts?
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> "To illustrate the difficulties, it may be pointed out that with reference to the Henderson-Doornbos No. 2 Unit, Halbouty's expert estimated that it had 420 acre feet, whereas Henderson's expert estimated that it had 1,760 acre feet, or an increase of 319% over the estimate of Halbouty's witness. Similarly, as to the

Henderson-Doornbos No. 1 Unit, Henderson's expert gave his client's lease an estimated 2,165 acre feet as compared to Halbouty's witness's estimate of 765 acre feet, or an increase of about 180%. Similarly, as to the Henderson-Montrose Unit, Halbouty's expert estimated that it had only 7,764 acre feet, whereas Henderson's expert estimated that it had 14,300 acre feet. In other words, Mr. Henderson's expert increased the estimate of Halbouty's expert by 84%.

"We assume, from what the Court has said, that the Railroad Commission must decide whether acreage, or acre feet, or estimates of reserves in place, or some other standard will be the basis for allocating expenses and revenues among the owners of tracts which are forced to unitize and the Commission must resolve any conflicts between experts in estimating productive acreage or acre feet or reserves in place. Even though the owners of small tracts feel that their acre feet or reserves are being grossly underestimated, in relation to similar estimates for adjoining tracts, still they would have to accept whatever the Railroad Commission decides if they are to share in the pool or unit. Presumably, also, the large unit operators must accept the Commission's decision under the threat that, if they do not, the small tract owners will be allowed to produce enough gas to pay back costs plus some profit. In that event, we respectfully ask, if the large unit operators either refuse to pool or unitize or will not accept the decision of the Railroad Commission regarding their share of any proposed unit, by what legal authority is the Railroad Commission then empowered to authorize the owners of small tracts to go ahead and separately develop their tracts and receive an allowable which will permit them to drain more gas than they originally had in place? Is the legal test of 'confiscation' in such cases to be something other than the denial to the owners of large tracts of

the right to recover the gas in place beneath their tracts?"

The right of separate development of small tracts, where the owners did not voluntarily pool with other tracts, has never been questioned in former decisions. Even though the Legislature in Article 6014, Vernon's Annotated Civil Statutes, gave the Railroad Commission broad authority to enact orders to prevent waste, the Legislature was very careful in paragraph (g) of this statute to expressly declare that it was not the intention of the Legislature to require repressuring of an oil pool or that the separately owned properties in any pool be unitize ' under one management, control or ownership. The Normanna decision is now being used as express authority from the Supreme Court of Texas to the Railroad Commission to ignore such cases as Ryan Consolidated Petroleum Corporation v. Pickens, supra; Pickens v. Ryan Consolidated Petroleum Corporation, Tex. Civ. App., 219 S.W. 2d 150, wr. ref. n.r.e.; Halbouty v. Darsey, Tex. Civ. App., 326 S.W. 2d 528, 532, wr. ref. n.r.e.; Nale v. Carroll, Tex. Civ. App., 266 S.W. 2d 519, 526, affirmed 155 Tex. 555, 289 S.W. 2d 743; Coates v. De Gracia, Tex. Civ. App., 286 S.W. 2d 691, 694; Section 1 of Article 6008b, Vernon's Annotated Civil Statutes; Dailey v. Railroad Commission, Tex. Civ. App., 133 S.W. 2d 219, wr. ref.; Stanolind Oil & Gas Company v. Railroad Commission Tex. Civ. App., 96 S.W. 2d 664, no wr. hist.; Nash v. Shell Petroleum Corporation, Tex. Civ. App., 120 S.W. 2d 522, wr. dism.; Railroad Commission v. Delhi-Taylor Oil Corporation, Tex. Civ. App., 302 S.W. 2d 273 wr. ref. n.r.e.; Halbouty v. Darsey, Tex. Civ. App., 331 S.W. 2d 835, no wr. hist.; Atlantic Refining Company v. Railroad Commission, Tex. Civ. App., 330 S.W. 2d 494, wr. ref.

n.r.e.; Railroad Commission v. Humble Oil & Refining Company, 151 Tex. 51, 245 S.W. 2d 488.

My contention is simply this: The statutes now in effect do not compel unitization. Therefore, the Railroad Commission has no legal authority to enter orders which would have the effect of requiring or compelling unitization. This very argument was persuasive and no doubt caused this Court in the Ryan case to adopt the view as expressed in the final majority opinion that without legislation requiring compulsory pooling, the Court had no power to enact such legislation. Thus, the Court adhered to the separate tract development theory under the well-settled rule of property. In the Ryan case, we discussed the fact that the State of Mississippi and other states had adopted unitization and pooling statutes, but expressly held that the rule of capture "has become a vested property right" and the "Legislature of Texas has not seen fit to enact legislation which would authorize the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture recognized in all the decisions in this State." The opinion of the majority in the present case, nullifying the proration order in the Port Acres Field, does exactly what the Ryan case said the Legislature of Texas has not seen fit to do. It not only authorizes, but it even requires the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture as recognized in all previous decisions in Texas. It cannot be said that the Ryan case was decided without due regard to all the problems we have presented in the present case. It was argued in the Ryan case that the majority opinion in that case permitted the confiscation by Pickens & Coffield of minerals belonging to Ryan. The dissenting opinion stressed the contention

that the majority opinion was based primarily on the rule of capture and strongly urged that Ryan was entitled to equitable relief to the extent that it should share in the ownership of all oil produced from Pickens and Coffield's land and that to allow the rule of capture to prevail would amount to an unconstitutional confiscation of Ryan's property, the theory being that "under our law no one has a right simply to capture the property of someone else." This Court rejected that theory. We said:

> "Petitioner's [Ryan] contention that this case is one for equitable relief should not be sustained for the further reason that its position is inconsistent with the law of capture, which is a well-settled rule of property in this jurisdiction. The rule of capture is simply this —that the owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though part of such oil or gas may have migrated from adjoining land. The Railroad Commission is without power from the Legislature * * * to do anything * * *."

We rejected the State of Mississippi authorities primarily on the ground that our Legislature had not adopted statutes to "safe-guard, protect and enforce the co-equal and correlative rights of owners in a common source or pool of oil and gas to the end that each such owner in a common pool or source of supply of oil and gas may obtain his just and equitable share of production therefrom * * *."

I still say, as we said in Ryan, that the Legislature of Texas has not seen fit to enact legislation which would authorize the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture recognized in all the decisions

in this State. The majority, on the other hand, now refuses to consider the physical facts with regard to "the peculiar characteristics of oil and gas", which has been established. See Brown v. Humble Oil & Refining Company, 126 Tex. 296, 83 S.W. 2d 935, 87 S.W. 2d 1096. Justice Wilson, the writer of the dissent in Ryan, said that the principles of geology and reservoir dynamics then known upheld his view and would eventually meet "with the same acceptance in judicial thought that they are accorded in business and financial thinking." We rejected such thinking then and should do so now. I agree with Dillon et al when they say, in their motion for rehearing, that the present decision in this case creates immediately many complex problems and, in the absence of legislation on the subject, leaves the Railroad Commission without a proper standard to be used in discharging its duties so far as oil and gas is concerned. The motion points out some of these problems, such as:

> "For example, exactly what does the Court mean when it says in its opinion (page 16) that 'the landowner is not restricted to the particular gas that may underlie his property *originally* but is the owner of all which he may legally recover? What is the test of what an owner can 'legally recover'? Is it the *equivalent* of the gas which was, *originally in place* beneath his tract? If so, must he stop producing his well when he has recovered such amount of gas, even though the reservoir beneath his tract has by that time been again refilled by gas which has been drained from other properties?
>
> "For example, every witness who testified in this case said that the appellant, Halbouty, would recover under the present proration formula *substantially more than 100%* of the recoverable gas originally in place beneath his leases, and it was admitted in Halbouty's

> main brief in this Court that he will recover over 26% of the field reserves, whereas it is estimated that his leases have only 22% of the field reserves under them. Must Halbouty stop producing when he has recovered 100% of the original reserves in place beneath his units? If he produces more than this, is he liable to Henderson for excessive drainage, since Henderson will suffer by excessive drainage to Halbouty's tracts (meaning by 'excessive' an amount exceeding the gas originally beneath the Halbouty leases)?" [Emphasis added.]

I agree with Dillon et al when they say:

> "Increased knowledge of engineering and geological facts about oil and gas reservoirs has not changed the fundamental nature of oil and gas as fluid substances which move in the reservoir, without regard to property lines, in response to pressure differentials, which are established by either natural or artificial forces. Where and how and to what extent such movements will take place cannot be predicted with certainty even now, particularly where wells are spaced widely apart and only estimates or intelligent guesses can be made as to the condition of the reservoir in the large undrilled areas between the wells. To apply, as the Court apparently has done in the opinion in this case, the same rules of property to oil and gas which are applied to solid minerals, is not only an abandonment of established rules of property but also an attempt to ignore fundamental physical facts."

There is no sound reason for the abandonment of the rules of property which have been long established in Texas. No previous decision has held that the Railroad Commission must deny a living allowable to a first well on a separate

tract. The Dillons et al., and other small tract producers in the Port Acres Field, have spent millions of dollars in drilling costs alone. If this decision is permitted to stand these people cannot possibly recover their costs, because the allowables for such well will be limited so far below their producing capacity that they can recover only the equivalent of the gas in place beneath each tract. No previous decision, including the Normanna decision, has intimated, much less held, that the Railroad Commission would be required to cut the allowables of the many Port Acres wells to the point where they could recover only a very small fraction of their cash investment. In the Normanna case, the Court indicated only that the predicted net profit to the Bright & Schiff well was unreasonably high. I think everyone will agree that the Normanna case was revolutionary, but, at the same time, there was nothing even in that case indicating that the Railroad Commission would be required to destroy the investments of the owners of wells lawfully drilled upon separate tracts. In this connection, I concurred in the result reached in the case of Railroad Commission of Texas et al. v. Murel Williams, Tex. , for the reasons stated in a concurring opinion delivered on April 11, 1962. I concurred in the result only for the reason that, in my opinion, the Court in the Williams case was lending encouragement to the advocates of compulsory pooling in their effort to effectively destroy the rules of property heretofore announced and followed by The Supreme Court of Texas.

In my opinion the allocation formula attacked in this case is reasonably supported by substantial evidence. The District Court correctly excluded the testimony of Commissioner Murray.

I agree with Dillon et al. when they say:

> "The proration orders attacked in this case are legislative orders, in that they apply generally to all producers in the Port Acres Field and are prospective in operation. Therefore tests which would apply to judicial or quasi-judicial decisions cannot properly be applied to the proration orders involved in this case. Certainly no one would contend that a statute could be attacked on the ground that the legislators voting for the statute had previously committed themselves, by agreements among themselves or otherwise, to a policy embodied in the statute, before it was passed. The only question would be whether the statute, based on evidence heard by the Court, is or is not in conformity with constitutional requirements. So, it is submitted, in this case, where a legislative order of the Railroad Commission is concerned, the Court should not inquire into the policies, motives, or methods of the Commission which caused it to adopt this formula rather than some other."

A helpful discussion of the scope of judicial review of oil and gas orders of the Railroad Commission is contained in the opinion in Railroad Commission v. Magnolia Petroleum Company, 130 Tex. 484, 109 S.W. 2d 967. That case refers to and quotes from the opinion in Railroad Commission v. Galveston Chamber of Commerce, 105 Tex. 101, 145 S.W. 573.

The same rule announced in the above cases was more recently stated by this Court in Railroad Commission v. Houston Natural Gas Corporation, 155 Tex. 502, 289 S.W. 2d 559, 573:

> "Earlier in this opinion we pointed out that where the attack upon a legislative act of the Railroad Commission is that it violates the Constitution because it

is confiscatory, we would not 'investigate the methods adopted by the Commission in fixing its rates, nor the motives or purposes which prompted such action.' **Railroad Commission v. Galveston Chamber of Commerce**, 105 Tex. 101, 145 S.W. 573, 580. The Commission may have used altogether erroneous methods and an erroneous conception of the law but if it arrived at a correct rate—and the court will test this rate against its own finding of fact—then the rate should be sustained."

The courts should simply test the validity of the order involved here on the basis of whether it is supported by substantial evidence. There is no logical reason why the Railroad Commission should be restrained from continuing in effect the allocation formula adopted August 18, 1958, for the Port Acres Field. I would affirm the judgment of the trial court.

Clyde E. Smith
*Associate Justice*

Opinion delivered: May 23, 1962

## APPENDIX "C"

### Opinion of Court of Civil Appeals in Halbouty v. Darsey

**IN THE COURT OF CIVIL APPEALS,**

Third Supreme Judicial District of Texas, at Austin

NO. 10,717

MICHEL T. HALBOUTY ET AL,
*Appellants*

vs.

W. G. DARSEY, JR. ET AL,
*Appellees*

**From District Court of Travis County, 98th Judicial District, No. 112,863, Honorable Chas. O. Betts, Judge.**

This is a Rule 37 case and is an appeal from a judgment sustaining an order of the Railroad Commission granting a permit to W. G. Darsey, Jr. for a well on his .48 acre tract in the Port Acres Field in Jefferson County.

The permit was granted December 22, 1958 "to prevent confiscation and or to prevent physical waste."

Appellant, Michel T. Halbouty, filed this suit against the Commission and Darsey to set aside the above order as being a discriminatory action by the Commission in which it acted arbitrarily, unjustly and unreasonably. He alleged that in addition to general rules of the Commission the following rule for the field became effective June 30, 1958:

"'Rule 1. No gas well shall hereafter be drilled nearer than thirteen hundred and twenty (1320) feet to any well completed in or drilling to the same reservoir on the same lease, unitized tract or farm, and no well shall be drilled nearer than three hundred and thirty (330) feet to any property line, lease line or subdivision line; provided, however, that the Commission will, in order to prevent waste or to prevent the confiscation of property grant exceptions to permit drilling within shorter distances than herein prescribed whenever the Commission shall have determined that such exception are necessary either to prevent waste or to prevent the confiscation of property. When exception to this rule is desired, application therefor shall be filed and will be acted upon in accordance with the provisions of Commission Statewide Rules 37 and 38, which applicable provisions of said rules are incorporated herein by reference.

"The aforementioned distances in the above rule are minimum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each one hundred and sixty (160) acre proration unit.

"In applying this rule the general order of the Commission with relation to the subdivision of property shall be observed.'

"The pertinent portion of Statewide Rule 37 reads as follows:

"'Section (a) . . . Such exception shall be granted only after at least ten (10) days notice to all adjacent lessees affected thereby has been given and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that an exception to such rule is necessary either to

prevent waste or to protect property belonging to the applicant from confiscation.'"

Appellant further alleged:

"For the reason that the gas and distillate reserves underlying the small lease of W. G. Darsey, Jr. has a value of less than $20,000.00 and for the reason that the expense of drilling a well to produce such gas and distillate reserves would not be less than $250,000.00. For this reason, Permittee has no realizable property interest of any value in the gas and distillate underlying the above described lease and no confiscation of any property interest could result from the denial of his application for special permit to drill a well on said lease. On the other hand, the drilling of such a well and production of gas and distillate therefrom would result in the confiscation of gas and distillate reserves underlying Plaintiff's various leases in the field and that a large amount of gas and distillate produced from such well after the recovery of gas and distillate of the value of about $20,000.00 would be gas and distillate drained and confiscated from beneath the leases belonging to Plaintiff. No waste would or could result from denial of the above described application granted to Permittee on December 22, 1958."

He alleged an unconditional offer to pool the .48 acre tract with other acreage in the field, that the permit afforded Darsey a method to drain great quantities of plaintiff's gas and condensate and further that:

"The gas bearing sand in this area of the Port Acres Field is such that natural pressure causes the gas and condensate to move toward areas of lower or reduced pressure. When wells are drilled from the surface into the gas sand and produce, areas of reduced pressure

are created at the bottom of wells, and reservoir energy of the gas bearing sand drive the gas and condensate to the well bore and up through the well to the surface. The gas and condensate readily migrate through the sand from areas of higher pressure to areas of lowered pressure at the bottom of the well; across and without reference to the surface property lines. The drilling and operation of Permittee's No. 1 Lavely Unit will enable it to drain, produce and confiscate to the use of Permittee large quantities of gas from the lands of others, including Plaintiff, in said Port Acres Field. Said movement and drainage from properties toward the Permittee's No. 1 Lavely Unit of appreciable quantities of gas and condensate will reduce in a large and inestimable amount the quantity of gas and condensate which Plaintiff's wells would otherwise recover. The Plaintiff has drilled no well closer than 330 feet to lease lines and has unitized its leases when the acreage contained in individual leases was less than 160 acres in size to fulfill the Railroad Commission policy for this field that one well could drain 160 acres, therefore, the Permittee has obtained a great spacing and draining advantage over the Plaintiff. Under the laws of this State, Plaintiff has no legal recourse against Permittee for the value of the gas and condensate which the No. 1 Lavely Unit will cause to drain from Plaintiff's properties, and the granting of the permit to drill and operate said well is unreasonable and unjust in fact, and discriminatory in favor of Permittee as against Plaintiff, and does and will constitute an unlawful taking of Plaintiff's property for the benefit of Permittee, without compensation to Plaintiff, and said orders deny Plaintiff the equal protection of the law and deprive Plaintiff of his property without due process of law, in violation of the 14th Amendment of the Constitution of the United States and Section 19, Article I of the Constitution of Texas."

Appellant, Pan American Petroleum Corporation intervened in the cause. It alleged substantially the same facts alleged by Halbouty and further that there are 500 small tracts in the field which would be entitled to a well and that if permit is granted on each of such small tracts the orderly development of the field would be prevented, and that there is set for a hearing before the Commission an application for an amendment to the rules for the field, that the well location is in a residential area and that the drilling of the well and its production would create a hazard to life and to property.

Halbouty and Pan American are both owners and operators in the field. The .48 acre tract is not a voluntary subdivision and the permit in question is for the first well on the tract.

Special exceptions were sustained to the pleadings, appellants declined to amend and their causes were dismissed. Halbouty says these special exceptions were based on the proposition that the "permittee has a right as a matter of law to drill his first well." Under the facts here, or rather under the facts here alleged, this statement is substantially correct.

The briefs discuss the merits of the pleadings rather than the special exceptions and we will so direct our attention.

Appellants appear to say that the permit to drill the well on the .48 acre tract should be denied because: (1) the cost of drilling the well exceeds the value of the oil and gas under the tract; (2) if the well is drilled and produced there will be drainage from the surrounding tract; (3) there is an unconditional offer to pool the .48 acre tract with other tracts in the field; (4) there is set for hearing before the Commission an application to amend the rules for production and operation in the field; (5) the

granting of permits to drill on small tracts in the field will prevent its orderly development; (6) the drilling and production of the well, because of the location of the .48 acre tract, will create a hazard to life and to property, and (7) generally the Commission violated its discretion in granting the permit.

Admittedly the .48 acre tract is not an unlawful subdivision for which reason no issue of waste is here presented. Railroad Commission v. Delhi-Taylor Oil Corp., Tex. Civ. App., 302 S.W. 2d 273, Er. ref, n.r.e. Also the tract is not of such size and shape to meet the acreage and distance requirements of the spacing rule applicable to the field, however admittedly it meets the requirements for an exception under Statewide Rule 37a. As such it is entitled to a well. Kraker v. Railroad Commission, Tex. Civ. App., 188 S.W. 2d 912. Er. ref, w.o.m. Dailey v. Railroad Commission, Tex. Civ. App., 133 S.W. 2d 219. Er. ref. Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. 2d 935, where Rule 37 and its exceptions were considered and also the rules of ownership, convenience and vested rights. Citation of additional authorities on this well settled question is not deemed necessary.

If appellees were denied a permit to drill on their .48 acre tract then clearly they would be denied the right to recover their fair share of the oil and gas in place under their land. The very purpose of Rule 37 by providing for exceptions, is to protect this right and it has been so declared. In Stanolind Oil & Gas Co. v. Railroad Commission, Tex. Civ. App., 96 S.W. 2d 664 this Court said:

> "Total deprivation of the landowner's vested right to a fair share of the recoverable oil in place under his land is not a proper remedy under our present conservation laws and rules promulgated thereunder."

The law recognizes the right of an owner to recover the oil and gas under his land as a vested right and one of which he cannot be deprived by the Commission. This being true the right is not to be denied because it appears to be uneconomical. This vested right to recover such oil and gas is to be considered in connection with the law of capture which is also recognized as a property right. Corzelius v. Harrell, 143 Tex. 509, 186 S.W. 2d 961, 964. Brown v. Humble Oil & Refining Co. supra. The probability that oil and gas from surrounding tracts would drain to the .48 acre tract could not be lawful reasons for denying the permit because such fact is only a part of the law of capture.

The unconditional offer to pool the .48 acre tract with surrounding tracts in the field can in no event defeat the permit under the facts here. This is not a matter over which the Commission has been given jurisdiction to require but is a subject for voluntary agreement. Dailey v. Railroad Commission supra.

The facts are to be considered as of the time the Commission acted and the fact that there is now, or at the time of trial there was, an application pending before the Commission to amend the rules applicable to the field would in no event govern the Commission's action. Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73, 82.

The orderly development of oil and gas fields and the production of oil and gas from such fields are matters vested in the Commission. For these purposes the Legislature has vested it with authority to make rules. It has promulgated rules for this purpose and the special permit here was granted by authority of the Commission's rule. See: Gulf Land. Co. v. Atlantic Refining Co. supra. Moreover

to now say that small tracts in the field are not entitled to be drilled under rules of the Commission would be to deny them the right of separate development even though it may result in densely drilled areas. Kraker v. Railroad Commission supra.

The fact that the drilling and production of the well on the .48 acre tract, because of the location of the tract, may create a hazard to life and to property would not violate the rule under which the permit was granted and the Commission could not refuse to apply the rule, exception, under a state of facts that would destroy such rule. Dailey v. Railroad Commission supra.

It may be said generally that the Commission is vested with authority and charged with the duty of conserving oil and gas and that in doing so it is its duty to see that oil and gas fields are drilled and produced in an orderly and scientific manner. However in so doing it cannot violate vested rights. We deem it not necessary to cite authorities in addition to those supra for this statement: The Commission has discretion in the exercise of the powers committed to its jurisdiction but no appellate court decision of this State has extended the exercise of this discretion to the denial of vested rights. We have not been cited to any authority, and we know of none, that would authorize the Commission to deny appellee a permit to drill a first well on his .48 acre tract and thereby, in effect, confiscate his property to the use and benefit of surrounding tracts with or without compensation. Particularly applicable to the argument of appellants is the statement of the court in Stanolind Oil & Gas Co. v. Railroad Commission, supra that:

"Exceptions to the rule, granted to protect vested rights, for which the rule expressly provides, presuppose some resultant waste, or other detriment. The inherent right of the landowner to obtain his fair share of the oil in place under his land is the basic consideration for the exception to the rule 'to protect vested rights,' which is deemed to outweigh other considerations for which the rule was promulgated. The commission has ample power to pass such rules or orders as may be necessary to minimize the deleterious effects flowing from exceptions to the rule."

The judgment of the trial court is affirmed.

Raymond Gray
*Associate Justice*

Affirmed
Filed: July 15, 1959.

## APPENDIX "D"

### Assignments 12-17 in Amended Motion for Rehearing

12.

The Court erred in reversing the judgment of the District Court and in rendering judgment for appellants and in not remanding the cause to the District Court for a new trial, because the Supreme Court has held offers of appellants to pool or unitize with appellees are relevant and material, and the appellees were not given a chance to controvert the evidence pertaining to the matter of offers to pool and unitize and such issue was not fully developed at the trial in the District Court, because the trial court deemed such evidence immaterial, and in the interest of justice the cause should be remanded for a retrial, and due process of law under the Fourteenth Amendment to the United States Constitution requires that appellees have the opportunity to present their evidence on issues not fully developed by the evidence at the trial.

13.

The Court erred in reversing the judgment of the District Court and rendering judgment for appellants and in not remanding the cause for a new trial, because if the appellees' right to an allowable sufficient to pay back drilling and operating costs plus a reasonable profit depends upon the existence of fair offers to pool or unitize appellees' tracts with other tracts, appellees are entitled to a judicial determination of the existence and fairness of such offers, and appellees by the Court's judgment are denied

such judicial determination of such issue, and such judgment is a denial to appellees of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

14.

The Court erred in holding that the right of appellees to an allowable which would permit them to recover their costs plus a reasonable profit is dependent upon the existence or non-existence of an offer to pool or unitize their tracts, because there is no procedure provided by statute or otherwise for a determination of the issue of pooling or unitization or the fairness of any offers to pool or unitize, and in the absence of any such procedure or any lawful standards for determining such issues, appellees are denied due process of law in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

15.

The Court erred in substituting its judgment for the judgment of the District Court, upholding the order of the Railroad Commission, upon issues which involve the judgment and discretion of the Railroad Commission in determining the weight to be given to various factors in the allocation formula, including the per well factor, because the effect of such judgment is to confiscate appellees' property and destroy their investments without a proper judicial determination of the issue of confiscation and to deny to appellees their rights under the Fourteenth Amendment to the United States Constitution.

16.

The Court erred in reversing the judgment of the District Court and in rendering judgment for appellants, because the Court's judgment has the effect of destroying the value of permits lawfully granted to appellees by the Railroad Commission under statutory authority to drill wells on their tracts and would deny to appellees the right to recover more than a small part of their investment costs in drilling and operating their wells and would prevent any return on appellees' investments, and such judgment results in the confiscation of appellees' property and denies them due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

17.

The Court erred in holding that the Railroad Commission in exercising the police power of the State under the conservation statutes is required to reduce the allowable of the appellees' wells so as to deny appellees any return on their investment and so as to make it impossible for appellees to recover their drilling and operating costs or any profit, and such holding constitutes and results in a confiscation of the property of appellees in violation of the Fourteenth Amendment to the United States Constitution.

## APPENDIX "E"

### Constitutional Provisions, Statutes and Administrative Order Involved

The constitutional provision involved is the second sentence of Section 1 of the Fourteenth Amendment to the United States Constitution, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are Articles 6008, 6008b, and 6014, Vernon's Texas Civil Statutes, the pertinent sections being as follows:

Article 6008:

> "Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:
>
> "(a) In the prevention of waste as 'waste' is defined herein;
>
> "(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article."
>
> "Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the

evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article."

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the

reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month. As amended Acts 1947, 50th Leg., p. 1059, ch. 453, s. 1."

"Sec. 13. In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at twenty-five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well."

Article 6008b:

"Section 1. Subject to approval of the Railroad Commission of Texas (hereinafter called Commission),

as hereinafter set out, persons owning or controlling production, leases, royalties, or other interests in separate properties in the same oil field, gas field, or oil and gas field, may voluntarily enter into and perform agreements for the following purposes:

"(A) To establish pooled units necessary to effect secondary recovery operations for oil or gas, including those known as cycling, recycling, repressuring, water flooding, and pressure maintenance and to establish and operate cooperative facilities necessary for said secondary recovery operations;

"(B) To establish pooled units and cooperative facilities necessary for the conservation and utilization of gas, including those for extracting and separating the hydrocarbons from the natural gas or casinghead gas and returning the dry gas to a formation underlying any lands or leases committed to the agreement.

"Such agreements shall not become lawful nor effective until the Commission finds, after application, notice and hearing:

"1. Such agreement is necessary to accomplish the purposes specified in (A) or (B) or both; that it is in the interest of the public welfare as being reasonably necessary to prevent waste, and to promote the conservation of oil or gas or both; and that the rights of the owners of all the interests in the field, whether signers of the unit agreement or not, would be protected under its operation;

"2. The estimated additional cost, if any, of conducting such operation will not exceed the value of additional oil and gas so recovered, by or on behalf of the several persons affected, including royalty owners, owners of overriding royalties, oil and gas payments, carried interests, lien claimants and others as well as the lessees;

"3. Other available or existing methods or facilities for secondary recovery operations and/or for the conservation and utilization of gas in the particular area or field concerned are inadequate for such purposes;

"4. The area covered by the suit agreement contains only such part of the field as has reasonably been defined by development, and that the owners of interests in the oil and gas under each tract of land within the area reasonably defined by development are given an opportunity to enter into such unit upon the same yardstick basis as the owners of interests in the oil and gas under the other tracts in the unit.

"Such agreements may provide for the location and spacing of input wells and for the extension of leases covering any part of lands committed to the unit so long as operations for drilling or reworking are conducted on the unit or so long as production of oil or gas in paying quantities is had from any part of the lands or leases committed thereto; provided that no such agreement shall relieve any operator from the obligation to develop reasonably the lands and leases as a whole committed thereto.

"Such agreements shall not bind any land owner, royalty owner, lessor, lessee, overriding royalty owner or any other person who does not execute them, but shall bind only the persons who execute them, their heirs, successors, assigns and legal representatives; but no person shall be compelled or required to enter into such an agreement."

Article 6014:

"The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and

is prohibited. The term 'waste' among other things shall specifically include:

"(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership."

The Railroad Commission order involved is Rule 3 of Oil and Gas Docket No. 128, #3-38,395, dated August 18, 1958, entitled "Special Order Adopting Rules and Regulations for the Port Acres (Lower Hackberry) Field, Jefferson County, Texas," as follows:

"RULE 3. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production, after deductions have been made for wells which are incapable of producing their gas allowables, among the individual wells in the following manner:

"(a) Two-thirds (2/3) of the allowed gas production from a non-associated gas reservoir shall be allocated to the individual wells completed therein in that proportion that the acreage assigned to each such well bears to the sum of the acreage in the reservoir.

"(b) One-third (1/3) of the allowed gas production from a non-associated gas reservoir shall be allocated equally among the individual wells completed therein.

"(c) The total daily non-associated gas allowable for each well shall be the sum of its acreage and per well allowables."

## APPENDIX "F"

### Judgment of 98th District Court, Travis County, Texas

NO. 115,096

| | | |
|---|---|---|
| MICHEL T. HALBOUTY, et al., | § | In the 98th |
| vs. | § | District Court |
| RAILROAD COMMISSION | § | of Travis County, |
| OF TEXAS, et al., | § | Texas. |

### JUDGMENT

On the 17th day of October, 1960, came on to be heard the above entitled and numbered cause, wherein Michel T. Halbouty, Meredith & Company, and Pan American Petroleum Corporation are plaintiffs, and the Railroad Commission of Texas and the members thereof, Ernest O. Thompson, Olin Culberson, and William J. Murray, Jr., are defendants, and Peter Henderson Oil Company, H. L. Dillon, Jr., Roger L. Bauman, J. H. Cordell, John Hill, John Marshall, John W. Pace, Gray Oil Company, J. C. Barnes, Tyrrell-Combest Realty Company, P. G. Lake, Inc., Lake Production Company, and Z. J. Spruiell are intervenors, and thereupon all parties, by their respective attorneys, announced ready for trial and all parties submitted the case to the court without intervention of a jury, and the defendants, the Railroad Commission of Texas, et al., and the intervenors, H. L. Dillon, Jr., et al., J. C. Barnes, Tyrrell-Combest Realty Company, and P. G. Lake, Inc., et al., thereupon presented to the court their special exceptions contained in their respective petitions in intervention, directed to the allegations contained in the first amended

original petition of the plaintiffs, Michel T. Halbouty, et al., and the second amended petition in intervention of Peter Henderson Oil Company, and the court, having heard argument upon said special exceptions by counsel for plaintiffs, defendants, and all intervenors, was of the opinion that said special exceptions, in so far as they are directed against allegations in the pleadings of the plaintiffs and the said intervenor, Peter Henderson Oil Company, as to the failure and refusal of the Railroad Commission to enter compulsory cycling orders or compulsory pressure maintenance orders in the Port Acres (Lower Hackberry) Field should be sustained, and the court thereupon sustained the special exceptions contained in the second amended original answer of defendants, the Railroad Commission of Texas, et al., in paragraphs 1, 6, 8, and 9 of said answer, and the special exceptions contained in paragraphs 2, 7, and 10 in the first amended petition in intervention of intervenors, H. L. Dillon, Jr., et al., and the special exceptions contained in paragraphs 16a, 16b, and 16c, as contained in the second trial amendment of the said intervenors, H. L. Dillon, Jr., et al., and the special exception contained in paragraph 3 of the first amended petition in intervention of J. C. Barnes, and the special exception contained in paragraph II (2) of the petition in intervention of Tyrrell-Combest Realty Company, and the special exceptions contained in paragraphs 3, 8, 10, and 11 in the petition in intervention of P. O. Lake, Inc., et al., in so far as said special exceptions related to allegations contained in the pleadings of the said plaintiffs and the said intervenor, Peter Henderson Oil Company, relating to the failure and refusal of the Railroad Commission of Texas to enter orders for compulsory cycling and compulsory pressure maintenance

in the Port Acres (Lower Hackberry) Field, to which action of the court the plaintiffs and the said intervenor, Peter Henderson Oil Company, in open court duly excepted; and the court then advised counsel that all other special exceptions contained in the pleadings of the defendants and the said intervenors, H. L. Dillon, Jr., et al., J. C. Barnes, Tyrrell-Combest Realty Company, and P. G. Lake, Inc., et al., would be held under advisement by the court; and the court thereupon proceeded to hear evidence offered by all parties on October 17, 18, 19, 20, 24, 25, 26, 27 and 31, and November 1, 2, and 3, 1960, whereupon all parties announced that they had closed their evidence, and the court on November 7, 1960, heard argument of counsel for all parties, and after having duly considered said argument, the court is of the opinion that all special exceptions contained in the second amended original answer of the defendants, the Railroad Commission of Texas, et al., the first amended petition in intervention of intervenors, H. L. Dillon, Jr., et al., and the first and second trial amendments of intervenors, H. L. Dillon, Jr., et al., the petition in intervention of Tyrrell-Combest Realty Company, the first amended petition in intervention of J. C. Barnes, and the petition in intervention of P. G. Lake, Inc., et al., except as they have been sustained by the court as hereinbefore recited, should be and the same are overruled; and having further duly considered the pleadings, the evidence, and the arguments of counsel for all parties, the court is of the opinion and finds and concludes that the orders of the Railroad Commission of Texas complained of herein by the plaintiffs and the intervenor, Peter Henderson Oil Company, are reasonably sustained by substantial evidence heard by this court in the trial of this

cause and that said orders of the Railroad Commission are lawful and valid orders.

It is therefore ORDERED, ADJUDGED and DECREED by the court that the permanent injunctions and all other relief prayed for by the plaintiffs and the intervenor, Peter Henderson Oil Company, be and the same is hereby denied and refused, and that the defendants, and the intervenors, H. L. Dillon, Jr., et al., J. C. Barnes, Tyrrell-Combest Realty Company, and P. G. Lake, Inc., et al., recover of and from the plaintiffs and the intervenor Peter Henderson Oil Company, their costs, for which execution may issue.

It is further ORDERED, ADJUDGED and DECREED by the court that all relief prayed for herein by any party which is not herein granted is hereby refused and denied.

To which judgment, action and order of the Court the plaintiffs, Michel T. Halbouty, Meredith & Company and Pan American Petroleum Corporation, and intervenor, Peter Henderson Oil Company, in open court duly excepted.

Rendered, signed and entered this 23rd day of November, 1960.

/Sgd/ D. B. WOOD

*Judge Presiding*
98th District Court
Travis County, Texas

APPROVED AS TO FORM:

/s/ Andrews Kurth Campbell & Jones
By Harry R. Jones
Attorney for Plaintiffs, Michel T. Halbouty, and Meredith & Company

/s/ Butler, Binion, Rice & Cook
By Cecil N. Cook
By James D. Smullen
Attorney for Intervenor, Peter Henderson Oil Company.

/s/ Houghton Brownlee, Jr.
Attorney for Defendants, the Railroad Commission of Texas, et al.

/s/ Jack Blalock
James P. Hart
Attorney for Intervenors, H. L. Dillon, Jr., et al.

/s/ Wallace H. Scott, Jr.
Attorney for Intervenor, J. C. Barnes.

/s/ John J. McKay
Attorney for Intervenor, Tyrrell-Combest Realty Company.

/s/ James N. Ludlum
Attorney for Intervenors, P. G. Lake, Inc., et al.

TURNER, RODGERS, WINN, SCURLOCK & TERRY
By /s/ Frank J. Scurlock
Attorney for Plaintiff, Pan American Petroleum Corporation

# APPENDIX "G"

## Judgment of the Supreme Court of Texas

NO. A-8200

February 14, 1962

| | | |
|---|---|---|
| MICHEL T. HALBOUTY, et al., | § | Direct Appeal |
| vs | § | from the 98th |
| RAILROAD COMMISSION OF TEXAS, et al., | § | District Court of |
| | § | Travis County. |

This cause came on to be heard on direct appeal from the 98th District Court of Travis County, Texas, and the original transcript and briefs and argument of counsel having been duly considered, because it is the opinion of the Court that in so far as this appeal involves the question of the refusal of the Railroad Commission of Texas to require compulsory cycling and pressure maintenance in the Port Acres Field this Court has no jurisdiction, and in that respect it is *adjudged, ordered* and *decreed* that this appeal be, and hereby is, dismissed.

"Because it is further the opinion of the Court (Associate Justice Griffith dissenting) that there was error in the judgment of the District Court in so far as it denied the injunction to restrain the Railroad Commission from continuing in effect the allocation formula, being Rule 3 of the "Special Order Adopting Rules and Regulations for the Port Acres Field," No. 3-38395, dated August 18, 1938, as prayed for by plaintiffs and the intervenor, Peter Henderson Oil Company, it is *adjudged, ordered* and *decreed* that said judgment, in that respect, be, and is hereby, reversed and set aside.

"And this Court proceeding to render judgment in that respect as should have been rendered below, it is *considered, adjudged, ordered* and *decreed* that Rule 3 of the "Special Order Adopting Rules and Regulations for the Port Acres Field", No. 3-38395, entered by the Railroad Commission of Texas, was not supported by substantial evidence and, therefore, is invalid and of no force and effect, and that the Railroad Commission of Texas, its members and their successors, agents and representatives, and each of them, be, and they are hereby, restrained and enjoined from enforcing Rule 3 of said "Special Order Adopting Rules and Regulations for the Port Acres Field", No. 3-38395, in accordance with the opinion herein this day delivered.

"It is further ordered that the appellees (defendants and defendant-intervenors), Railroad Commission of Texas, H. L. Dillon, Jr., Roger L. Baumann, J. H. Cordell, John Hill, John Marshall, John W. Pace, and Gray Oil Company, a partnership composed of E. J. Gray and Eddie V. Gray, J. C. Barnes, Tyrell-Combest Realty Company, P. G. Lake, Inc., Lake Production Corporation and Z. J. Spruiell, jointly and severally, pay all costs in this cause expended and incurred in this Court and the District Court; that appellants (plaintiffs and plaintiff-intervenor), Michel T. Halbouty, Meredith & Company, Pan American Petroleum Corporation and Peter Henderson Oil Company, have and recover of and from the above named appellees, Railroad Commission of Texas et al., the costs by them expended and incurred in said courts, and that this decision, with a copy of the opinion, be certified to the District Court of Travis County, Texas, for observance."

## APPENDIX "H"

### Order of the Supreme Court of Texas Overruling Motions for Rehearing

### IN THE SUPREME COURT OF TEXAS

NO. A-8200

May 23, 1962.

| | | |
|---|---|---|
| MICHEL T. HALBOUTY, et al., | § | Direct Appeal |
| vs. | § | from the 98th |
| RAILROAD COMMISSION | § | District Court of |
| OF TEXAS, et al., | § | Travis County. |

Motion for rehearing on behalf of the Railroad Commission of Texas and motion for rehearing on behalf of H. L. Dillon et al., filed herein on March 1, 1962, as well as motion of R. L. Dillon et al. to amend their motion for rehearing, filed herein on March 16, 1962, having been duly considered by the Court, it is ordered that the motion of H. L. Dillon et al. to amend their motion for rehearing be, and hereby is, granted, and that the motion for rehearing of the Railroad Commission of Texas and the motion for rehearing of H. L. Dillon et al. as amended, be and hereby are, overruled.

(Dissenting opinion on Motion for Rehearing by Clyde E. Smith, Associate Justice).

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No. 341

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

H. L. DILLON, JR., ET AL.,

*Petitioners,*

v.

MICHEL T. HALBOUTY, ET AL.,

*Respondents.*

## BRIEF OF RESPONDENT PETER HENDERSON OIL COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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No. 341

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

H. L. DILLON, JR., ET AL.,

*Petitioners,*

v.

MICHEL T. HALBOUTY, ET AL.,

*Respondents.*

## BRIEF OF RESPONDENT PETER HENDERSON OIL COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

*To The Supreme Court of The United States:*

Respondent, Peter Henderson Oil Company[1] ("Henderson"), files this, its Brief in Opposition to the granting of the Petition for Certiorari, and respectfully shows the Court the following, to-wit:

### PREFATORY STATEMENT

This is a special statutory appeal under Article 6049c, Texas Civil Statutes, from an order of the Texas Railroad

[1] In the proceedings before the Commission, the District Court, the Supreme Court of Texas and this Court, Henderson was and is acting for itself and as operator for its co-owners (S.F. 681-6) and, as it is required by its leases and the law, for its more than 400 royalty owners (S.F. 64, Henderson Ex. 71).

Commission, which statute provides, among other things, that "such suit shall be advanced for trial and determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court," (Section 8) and that it is "the duty of the (Texas) Supreme Court immediately to set down said cause for hearing and decide the case at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character." (Section 11). The Texas Supreme Court accepted jurisdiction of the case as a direct appeal from the Trial Court (i.e., instead of appealing first to the intermediate appellate court, the Texas Court of Civil Appeals) pursuant to Texas Supreme Court Rule 499-a, which permits such appeals upon "questions of law only." See Appendix, page 41a hereof. Such Court has held that the only issue in such cases is whether or not the order is reasonably supported by substantial evidence, and that this is a question of law only. *Thomas* v. *Stanolind Oil & Gas Co.* (1946), 145 Tex. 270, 198 S.W. 2d 420; *Railroad Commission* v. *Sterling Oil & Gas Co.* (1949), 147 Tex. 547, 218 S.W. 2d 415.

As pointed out to the Texas Supreme Court in Henderson's Reply to Petitioners' Amended Motion for Rehearing:

> "Nearly three and a half years have now elapsed since Henderson filed an application with the Railroad Commission for relief from the unjust and confiscatory proration order involved in this suit. Nothing can be done to restore the gas and condensate drained from the Henderson properties during the pendency of this litigation, and each day Henderson's loss by drainage increases. The enormity of such loss is readily apparent from the fact that in October, 1960, Henderson's aggregate loss over the 13-year remaining life of the Field was estimated at $13,450,000, and on a straight line basis, Henderson's loss by drainage is in excess of $1,000,000 per year. Sixteen months of the 13-year

period have already passed. We submit that in fairness to all concerned, the time has come to grant this Appellant the relief to which it is so justly entitled by the the prompt rendition of this Court's judgment and issuance of the mandate in accordance with its opinion dated February 14, 1962." (Reply of Appellant Peter Henderson Oil Company to Appellees' Amended Motion for Rehearing and Supplemental Brief, p. 16)

The serious consequences of further delay to Henderson was recognized by the order of the Supreme Court of Texas dated August 20, 1962, refusing the Motion of Petitioners to delay issuance of the mandate and execution and enforcement of its Judgment beyond October 15, 1962, and stating that the stay would extend only until October 15, 1962, and "not thereafter unless further delay of issuance of the mandate and execution and enforcement of the judgment of this Court is ordered by the Supreme Court of the United States on petition made to that Court."

This Respondent submits that the Petition for Certiorari is frivolous and presents no federal questions of substance or otherwise. It serves the purpose of postponing the promulgation of a new gas proration order by the Texas Railroad Commission to take the place of the one declared invalid by the Texas Supreme Court.[2]

As grounds for Henderson's position, the following points are submitted:

**(1) The Railroad Commission Of Texas, The Main Party Defendant, Has Not Joined In The Petition**

Petitioners were mere intervenors in an appeal to the District Court of Travis County, Texas brought by Henderson and the other Respondents, as Plaintiffs, against the Texas Railroad Commission, as Defendant, to set aside as

[2] See notice of new hearing called by the Railroad Commission, Appendix page 242.

unreasonable, arbitrary and confiscatory to Respondents, a gas proration order for the Port Acres Field, Jefferson County, Texas, which the Texas Supreme Court found caused and will continue to cause the drainage of tremendous quantities of gas and liquid petroleum hydrocarbons from Henderson's properties to the properties of Petitioners and others. *The Texas Railroad Commission, the only necessary party Defendant to Respondent's appeal*[3] *has acquiesced in the decision of the Texas Supreme Court by not joining in the Petition for Certiorari or filing one of its own.* Since the Railroad Commission was the only necessary party, the result of this case would have been precisely the same even if Petitioners had not intervened.

In their original Brief For Appellees, H. L. Dillon, Jr., et al. filed in the Texas Supreme Court, Petitioners said:

> "The proration orders attacked in this case are legislative orders, in that they apply generally to all producers in the Port Acres Field and are prospective in operation. Therefore tests which would apply to judicial or quasi-judicial decisions cannot properly be applied to the proration orders involved in this case. * * * In this situation, it is submitted that the Texas decisions are correct in holding that the reviewing court * * * will simply test the validity of the order in question on the basis of whether it is supported by substantial evidence *relating to its effect upon the complaining parties.*" (Pages 24, 26-27.)[4]

Although Petitioners have now changed their tune since the Texas Supreme Court held that the order in suit *is not supported by substantial evidence relating to its effect upon the complaining parties,* it seems too plain to admit of doubt that Petitioners have no standing to assert the valid-

---

[3] *Trapp* v. *Shell Oil Company* (1946), 145 Tex. 323, 198 S.W. 2d 424.

[4] All emphasis is supplied by the writers of this Brief unless otherwise indicated herein.

ity of the order in suit merely on the ground that it is fair to them; no attempt being by them made to show that the order is fair and reasonable as to all operators. An order will not stand merely because it treats some operators well, if it is unjust, unreasonable and discriminatory as to others. Our laws protect those who are injured, not those who seek to preserve a special privilege.

**(2) No Novel Questions Are Presented**

The only issue before the Texas Supreme Court was whether or not a gas proration order for the Port Acres Field, Jefferson County, Texas, was invalid as to Respondents because it permitted the drainage of tremendous quantities of gas and liquid petroleum hydrocarbons from Respondents' properties (particularly Henderson) to the properties of Petitioners and other operators. The basis of that Court's holding is as set forth in the next to last paragraph of its opinion, wherein it held the proration order in suit invalid because "it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent." In a preceding portion of the opinion, the Court said:

> "It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract, he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land." (Appendix, p. 19a).

In *Thompson* v. *Consolidated Gas Utilities Corp.* (1936), 300 U.S. 55, 81 L. Ed. 510, this Court construed the same statute here involved, Article 6008, Texas Civil Statutes, as authorizing and requiring, no issue of waste being involved, the Texas Railroad Commission to prorate gas so as to prevent drainage from one's property and held invalid a Railroad Commission order which did not do so.

In *Cozelius* v. *Harrell* (1945), 143 Tex. 509, 186 S.W. 2d 961, the Texas Supreme Court cited *Thompson* v. *Consolidated Gas Utilities Corporation* as an authoritative construction of Article 6008, and held that the statutory criteria in Article 6008 "to adjust correlative rights" and "to compel ratable production" so as to give each owner his "fair share" is definite and certain.

After the District Court judgment in the instant case but before it was decided by the Texas Supreme Court, such Court held, in *Atlantic Refining Company* v. *Railroad Commission of Texas* (1961), Tex. , 346 S.W. 2d 801, that an identical gas proration order for the Normanna Field, Bee County, Texas, was invalid in that it caused, and did not prevent, drainage.

These are the only cases, other than the instant one, by the highest Court of this State or by this Honorable Court interpreting Article 6008.[5] *There is no reasonable basis for the slightest difference of opinion as to their application to the undisputed facts of this case.*

### (3) No Loss Can Possibly Result To Petitioners From The Invalidation Of The Present Gas Proration Order

In their original Brief filed in the Supreme Court of Texas, the Petitioners stated:

> "As far as proration is concerned, the cancellation of the $\frac{1}{3}$-$\frac{2}{3}$ allocation formula would give appellants (Henderson and the other Respondents) no relief unless the Railroad Commission entered some other allocation formula on the basis which appellants urge, substantially in proportion to gas reserves in place. If, after the $\frac{1}{3}$-$\frac{2}{3}$ formula were cancelled by the Court,

[5] For a holding of the Texas Supreme Court that an oil proration order which causes drainage is likewise invalid, see *Marrs* v. *Railroad Commission* (1944), 142 Tex. 293, 177 S. W. 2d 941, discussed at pages 22-24 of this Brief.

> the Commission simply did nothing, then the gas wells in the Port Acres Field would either be able to produce without restrictions or they would be limited only by the Railroad Commission's Statewide Rule No. 25, which allows each gas well to produce not to exceed 25% of its potential capacity. *In this situation, the wells on the small tracts would be able to produce on at least an equal basis with the wells on the larger tracts, since the small tract wells have high potentials.*" (Petitioners' original Brief, p. 9.)

Again, in their Original Motion for Rehearing to the Supreme Court of Texas, Petitioners made it clear that they, the owners and operators of the small tract wells, would suffer no injury by producing under Statewide Rule 25 until a new gas proration order is adopted by the Railroad Commission when they said:

> "Under the [illegible] proration order, each well on a large unit produces *five times* as much as a well on a small tract. (Page 31, emphasis here is that of Petitioners).
>
> . . . .
>
> "All of the wells drilled on the small tracts are wells of high producing capacity, better than the average for the field, and if the allowables were distributed on the basis of daily producing capacity of each well, as compared with the aggregate daily producing capacity of all gas wells in the Field, then *the allowable of each well on a small tract would be at least substantially equal to the allowable of each well on a large unit.*" (Page 16)

***Thus, as a result of the invalidation of the present gas proration order and unless and until the Railroad Commission shall enter some new gas proration order, Petitioners have told the Supreme Court of Texas they will gain at least 200% in their rate of production.***

As this Court said in *Market Street R. Co.* v. *Railroad Commission of California* (1944), 324 U.S. 548, 89 L. Ed. 1171:

> "But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties."

**(4) Petitioners' Claims Are Premature**

Petitioners real complaint is not what the Supreme Court of Texas has done, but what the Railroad Commission of Texas may hereafter do and is therefore premature. *Republic Natural Gas Co.* v. *Oklahoma* (1947), 334 U.S. 62, 92 L. Ed. 1212; *Parker* v. *County of Los Angeles* (1949), 338 U.S. 327, 94 L. Ed. 144; *LaClede Gas Light Company* v. *Public Service Com. of Missouri* (1937), 304 U.S. 397, 82 L. Ed. 1422; *United States* v. *Public Utilities Com.* (1952), 345 U.S. 295, 97 L. Ed. 1020, *West Virginia Motor Truck Ass'n* v. *Public Service Commission of West Virginia* (1954), 123 F. Supp. 206, aff'd, 348 U.S. 881, 99 L. Ed. 693.

In its opinion, the Texas Supreme Court took occasion to say:

> "• • • the court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors. We are limited to passing upon the validity of the order as promulgated.
>
> "• • • •
>
> "• • • • but we are confident that with the trained personnel at their disposal a much nearer approximation can be made (by the Railroad Commission), giving to *all parties* an opportunity to produce a fair share of the minerals underlying the field with ratable allowables that will be more nearly equitable than appears in the case before us." (Appendix, ppgs. 17a, 21a).

Is this Court prepared to hold that no such gas proration order can be made by the Texas Railroad Commission? It refused to do so under similar circumstances in *Hunter Co.* v. *McHugh* (1943), 320 U.S. 222, 88 L. Ed. 5, when it said:

> " • • • for we cannot say that no order could be made by the Commissioner which would apportion the production • • • in a manner which would be consonant both with the requirements of the statute and the Federal Constitution. • • • It will be time enough to consider the constitutionality of any particular apportionment and distribution of costs when we have before us the specific provisions of an order directing them which has been subjected to the scrutiny of the state court."

**(5) Petitioners Will Be Afforded A New Trial On All Relevant Issues Before The Texas Railroad Commission**

Petitioners' contention that their Constitutional rights have been infringed because of the failure of the Texas Supreme Court to remand this case to the District Court to receive certain evidence Petitioners say they desire to present, relates solely to *dicta* in the Court's opinion, was raised for the first time in an Amended Motion for Rehearing, and was not the basis or effect of the Court's opinion, the real effect of which is to remand this case to the Railroad Commission for a new and proper order after notice and hearing as required by Texas law. Article 6008, Section 12; Article 6036a, Texas Civil Statutes.

The attention of this Court is now invited to certain specific portions of the Petition for Certiorari under the following headings:

## OPINIONS BELOW

At pages 2, 7, 10 and 13 of the Petition, the Texas Court of Civil Appeals case of *Halbouty* v. *Darsey* (1959), 326 S.W. 2d 528, writ refused, N.R.E., is referred to as a "companion case." The Court of Civil Appeals' opinion in such case is copied in full as Appendix "C", beginning at page 64 of the Petition.

The term "companion case" is a misnomer. *Halbouty* v. *Darsey* was tried and finally disposed of (Rehearing denied, August 5, 1959) by the Texas Court of Civil Appeals before the pleadings in the instant case were even filed in the trial court (August 14, 1959), and nearly three years before the order of the Texas Supreme Court overruling Petitioners' Amended Motion for Rehearing in the instant case. The decision in *Halbouty v. Darsey* was by an inferior appellate court while the decision sought to be reversed by Petitioners in the instant case is by the Texas Supreme Court. Different orders of the Railroad Commission were involved and different parties were involved.

Although the Texas Supreme Court refused to review the decision of the inferior court in the *Darsey* case[6] it did so with the notation "writ refused, no reversible error." According to Texas Supreme Court Rule 483, this means that "the Supreme Court (was) not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but (was) of the opinion that the application presents no error which requires reversal."

It is respectfully submitted that the reference to the

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[6] Such case, as well as the opinions in the case of *Humble Oil & Refining Co.* v. *C. C. Cook et al* (Tex. Civ. App. 1948), 215 S.W. 2d 383, cited at page 21 of the Petition for Certiorari, and *Railroad Commission* v. *Humble Oil & Refining Co.*, (Tex. Civ. App., 1946), 193 S.W. 2d 824, cited at page 6 of the Petition for Certiorari, should not be regarded as containing authoritative statements of Texas law in view of Texas Supreme Court Rule 483.

opinion of the Court in *Halbouty* v. *Darsey* as one of the "Opinions Below" is inaccurate and misleading and not in compliance with this Court's Rule 23.

## JURISDICTION

This Court has no jurisdiction of this controversy under Section 1257(3) of Title 28, United States Code, because:

(a) The validity of no treaty or statute of the United States is here involved;

(b) No title, right, privilege or immunity of Petitioners under Section 1 of the Fourteenth Amendment to the Constitution of the United States (the only Federal Constitutional or statutory provision cited by Petitioners) has been infringed;

(c) The Judgment is not "final" within the meaning of Section 1257, Title 28, United States Code, as interpreted by this Court in *Republic Natural Gas Co. v. Oklahoma* (1947), 334 U.S. 62, 92 L. Ed. 1212, and the other cases cited at page 8 hereof;

and,

(d) No Federal issues are here involved.

The only issue before the Court was as stated by the Petitioners in one of their Briefs to the Texas Supreme Court before the necessity of framing issues for a Petition for Certiorari arose, as follows:

> "* * * Our position is that the owners of these wells (Petitioners' wells) are *legally entitled*[7] to produce the gas and condensate which the evidence in this case shows that they will recover, under judicial decisions establishing the law of capture as a property right and recognizing the natural advantages of wells drilled on small tracts and their right to recover at least enough gas to pay the cost of drilling and operating, plus a

[7] Emphasis here is that of Petitioners.

> reasonable profit." (Reply Brief for H. L. Dillon, Jr., et al., p. 12);

regardless of the fact, as the Texas Supreme Court found (Appendix, page 12a), that in excess of 90% of such production will be drained from others' property.

It was and still appears to be Petitioners' contention that because of certain cases by the inferior Texas Courts of Civil Appeals which the Texas Supreme Court did not choose to review but refused the writs with the notation "no reversible error," Petitioners have a vested property right regardless of the consequences to their neighbors, to produce "enough gas to pay the cost of drilling and operating, plus a reasonable profit." The Texas Supreme Court has held that Petitioners have no such property right. It is submitted that the law of Texas has not changed in this respect as Petitioners seem to think. But even if the opinion of the Texas Supreme Court should evidence such a change, this would afford Petitioners no grounds for review by this Court. As this court said in *Patterson* v. *Colorado* (1906), 205 U.S. 454, 51 L. Ed. 879:

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the constitution of the United States is not infringed. * * * But, in general, the decision of a Court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th amendment merely because it is wrong or because earlier decisions are reversed."

And in *Nickel* v. *Cole*, 256 U.S. 222, 225, 65 L. Ed. 900, 905, 41 S. Ct. 467, the Court said:

> "But the answer to this is that when, as here, there is no pretense that the (State) court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong."

## QUESTIONS PRESENTED FOR REVIEW

### (As Stated by Petitioners)

1. In the first of Petitioners' Questions for Review, this Court is asked to assume jurisdiction of this case because, Petitioners say, the Texas Supreme Court should have remanded the case to the District Court, instead of rendering judgment for Respondents, in order to allow Petitioners to offer certain evidence. As we have already pointed out, the real effect of the Texas Supreme Court's decision is to remand this case to the Texas Railroad Commission so that, after notice and a hearing, it may devise a new proration order which will treat all parties fairly and justly. But even if this were not so, surely the question framed by Petitioners is not "a federal question of substance" within the meaning of this Court's Rule 19. As this Court said in *United Gas Public Service Co. v. Texas* (1937), 303 U.S. 123, 82 L. Ed. 702:

> "With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court and on appeal. It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. *The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements.*"

In addition, it is submitted that Petitioners are incorrect in stating that the Texas Supreme Court considered evidence of the offers made to Petitioners to unitize their leases with Respondents' leases to be material to the issues decided by it, as stated at page 3 of the Petition for Certiorari. The fact is the Court held "no such problem is before us." See page 22a of the Appendix to this Brief. Moreover, it is incorrect to state that Petitioners "have not had a chance to offer their evidence on this issue," or to infer, as Petitioners do, that they will not still have such a chance. Petitioners had such an opportunity at the hearing held by the Texas Railroad Commission, (the "primary fact finding agency" under Texas procedure relating to review of Railroad Commission orders), had such an opportunity in the District Court, and will have still another opportunity to offer any such evidence as may be relevant at the new hearing to be held by the Texas Railroad Commission after this litigation is terminated. See the discussion of these matters at pages 33-36 hereof, and see Notice of Hearing at page 24a in the Appendix hereto.

2. In their second Question for Review, Petitioners ask this Court to decide that "there is no statute in Texas authorizing or providing any procedure for compulsory unitization of separate tracts and that there is not any statutory or other reasonably definite legal standard by which the fairness or validity of an offer of unitization can be determined."

This would appear to be a large order for the Court to fill under the record now before it. Although no question of "compulsory unitization" has ever been an issue in this case, Petitioners' second Question for Review is apparently directed at the statement in the Texas Supreme Court's opinion to the effect that "While the (Texas) statute does not compel unitization, nevertheless it does expressly authorize that procedure subject to the approval of the Rail-

road Commission" (see the first paragraph on page 22a of the Appendix to this Brief), and to the Court's holding herein and heretofore that the Texas gas proration statute, Article 6008, Texas Civil Statutes, does provide reasonably definite standards (page 6, supra). It seems clear that no Federal question is raised thereby.

In *Mobil, J. & K. C. R. Co.* v. *Mississippi* (1907), 210 U.S. 187, 52 L. Ed. 1016, this Court said:

> "There is nothing in the statutes or Constitution of the United States which prevents a state from creating a board of railroad commissioners, and what powers the board shall have will depend on the law creating them, of which the courts of the state are the absolute interpreters * * *. The power of the commission, and the effect of its order, depended upon the statutes of the state, and of them, as we have said, the [state] supreme court is the absolute interpreter."

Again, in *Railroad Commission of Texas* v. *Pullman Co.* (1940), 312 U.S. 496, 85 L. Ed. 971, this Court said:

> "* * * The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas."

See also, *Atlantic C. L. R. Co.* v. *North Carolina Corp. Comm.* (1906), 206 U.S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398; *Nelson* v. *County of Los Angeles* (1960), 362 U.S. 1, 4 L. Ed. 2d 494, *Clay* v. *Sun Insurance Office, Ltd.* (1960), 363 U.S. 207, 4 L. Ed. 2d 1170; *Scripto, Inc.* v. *Carson* (1960), 362 U.S. 207, 4 L. Ed. 2d 660; and *Milk Wagon Drivers' Union of Chicago, Local 753* v. *Meadowmoor Dairies, Inc.* (1940), 312 U.S. 287, 85 L. Ed. 836, wherein (the last cited case) this Court said:

> "To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state * * * tends to discredit the great immunities of the Bill of Rights."

3. In Question No. 1., Petitioners ask the Court to assume that Petitioners did not have a hearing (and impliedly, will not have another) on the fairness and validity of unitization offers made to them by Respondents. However, in Question No. 3., Petitioners ask the Court to assume that they had or will have such a hearing, but only after they have decided to reject the offers. It would appear obvious that either Question No. 1. is the real Question for Review and Question No. 3. is purely hypothetical, or that Question No. 3. is Petitioners' real Question for Review and Question No. 1. is purely hypothetical. As this Court has made it clear in numerous opinions, it is improper to call upon it to decide purely hypothetical questions and it will not do so. Examples are *Alabama State Fed. of Labor* v. *McAdory* (1944), 325 U.S. 450, 89 L. Ed. 1725; *Asbury Hospital* v. *Cass County* (1945), 326 U.S. 207, 90 L. Ed. 6; *Rice* v. *Sioux City Cemetery* (1954), 349 U.S. 70, 99 L. Ed. 897, and in the last cited case, the Court said:

> "But this Court does not sit to satisfy a scholarly interest in such issues. * * * 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

As we have already indicated, this litigation resulted from the refusal of the Texas Railroad Commission to change its method of proration; not from an order of the Railroad Commission (which we hope will soon be entered) prorating the production of gas in the Port Acres Field on a reserves or some other reasonable basis and requiring

all producers to comply therewith. If an order of the latter type is entered, Petitioners will then be entitled to allege and show, if they can, such special facts and circumstances as may exist why they should have their allowables fixed on some different basis. As is made clear by the cases cited at pages 34 and 35 hereof, the Supreme Court of Texas could not have remanded the case to the District Court to receive evidence on any such issue because the Texas Railroad Commission has not passed upon such an issue or yet had occasion so to do.

The effect of the Supreme Court's Judgment was simply to remand this matter to the Railroad Commission for hearing and the entry of a reasonable order and in connection therewith to consider and pass upon all fact issues then before it. As to Petitioners' contention that any such hearing will be held only after they have made their investments, the Court's attention is directed first, to the fact that the question fails to inform the Court that all such investments were made *pendente lite* after the commencement of these proceedings to set aside the order Petitioners claim to have relied upon, and second, the fact of such *pendente lite* investments and the effect thereof can be taken into account by the Texas Railroad Commission, to such extent as it may deem proper, in establishing a new plan of gas proration for the Port Acres Field.

When similar "Questions for Review" were presented to this Court in *Asbury Hospital* v. *Cass County* (1945), 326 U.S. 207, 90 L. Ed. 6, the Court said:

> "We are thus asked to pass on the constitutionality of a possible application of the state statute in advance of its application to appellant, and of its authoritative construction by the state courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This court is without power to give advisory

> opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute whose constitutional validity is drawn in question, is to be applied."

4. The fourth Question for Review would have the Court decide that the Fourteenth Amendment to the Constitution of the United States guarantees Petitioners the right to drain gas from Respondents (the fact of such drainage having been found by the Texas Supreme Court and admitted by Petitioners) to the extent necessary to recoup a "return on their investments plus a reasonable profit." This remarkable contention would require the Court (i) to annul prior decisions of the Texas Courts and this Court as to the non-existence of any right to drain oil and gas from one's neighbor, (ii) to prorate the production of gas in a manner different, so far as we know, from the methods employed by any State, and (iii) to sit as a super appellate regulatory agency as to each producer in every oil and gas field in this country. It seems obvious that Petitioners speak in the wrong forum.

As this Court made it clear in *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.* (1939), 310 U.S. 573, 84 L. Ed. 1368:

> "Whether, as contended by the respondent, the maximum figure set by the Commission is too high in that it leads to the capture of oil from beneath its leases by neighboring operators, and whether a lower limit might suffice to assure profitable production — these questions take us into that debatable territory which it is not the province of the Federal Court to enter.
>
> . . .
>
> "Plainly these are not issues for our arbitrament."

Subsequently, in *Burford* v. *Sun Oil Company* (1942), 319 U.S. 315, 87 L. Ed. 1424, this Court said:

> "The prevention of confiscation is based on the premises that, in so far as these privileges are compatible with the prevention of waste and the achievement of conservation, each surface owner should be permitted to withdraw the oil under his surface area, *and that no one else can fairly be permitted to drain his oil away.* * * * By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."

At page 12 of their Reply Brief filed in the Texas Supreme Court Petitioners say "We have never contended and we do not now contend that the justification for the ⅓ - ⅔ formula is 'that without such formula the small tract operators will not be permitted to recover the approximately $50,000 (or less) in reserves underlying their respective tracts.'" Petitioners seek much more; the right to produce the gas reserves of Respondents through Petitioners' wells.

Similar contentions were asserted by the Plaintiffs in the landmark case of *Marrs* v. *City of Oxford* (C.C.A., 8th, 1929), 32 F. 2d 134, cert. den. 280 U.S. 573, 74 L. Ed. 625, wherein the Court said:

> "But looking to the substance of things, as equity does, what are the rights of plaintiffs that will be encroached upon or denied to them by the enforcement of this ordinance? It is not the mere right to drill a well on one or two lots at great cost and stop with that, or to take the proportionate part of the oil and gas in the pool that might be said to lie under or be fairly attributed to those lots. The obvious purpose was to reach the pool as quickly as possible and take all of the oil and gas obtainable before others could get it, thus seriously encroaching upon and probably

destroying the same rights of adjoining lot owners. If one or more lot owners have given a lease for which no permit is obtainable their lessee may join a lessee who has a permit in the same block on terms that are fair to both lessor and lessee. If a lot owner has not given a lease he is protected by the asking in a fair proportion of the mineral produced by a permittee. The regulations make every effort to protect, rather than to destroy rights. They extend equal opportunity to all who have an interest and eliminate the race between those having equal rights in a common source of wealth, so that some may not take all and leave others with nothing. • • •

" • • • •

" • • • The basis of a statute, suggested in the Indiana case, is the governmental power to equally protect each surface owner in his right to a common fund. Complaint is made that the city was not vested with that power. Let it be conceded; still it does not follow that a court of equity will lend its aid to one in his effort to take all of a fund in which there is a community interest. The bill seems to us to be wholly without merit and the judgments of dismissal are

"Affirmed."

## REGARDING PETITIONERS' STATEMENT OF THE CASE

Petitioners' Statement of the Case is both inaccurate and incomplete. Some of the inaccuracies are these:

1. *That "this case involves only the question of correlative rights between the big tract operators on the one hand and the small tract operators on the other hand."* (Page 5 of the Petition for Certiorari)

As evidence of the complete inaccuracy of such statement, the court need only refer to the following, which is taken from pages 8 and 9 of the "Post-Submission Brief for Ap-

pellees H. L. Dillon, Jr. et al." (these same Petitioners) filed in the Texas Supreme Court:

> "This case * * * is not just a controversy between the producers owning large acreage and those having small acreage.
>
> * * *
>
> "Henderson's leases are located in the western half half of the field (where the townsite wells are also located), where the gas sands are as much as ten times as thick as the sands in the eastern part of the field, according to the estimates of the expert witnesses. Therefore, *Henderson* * * * refused to align itself completely with the (other) plaintiffs in the District Court (S.F. 36, 140) and *attacks the allowable granted to the large tracts in the eastern side of the field*, owned by the appellants, Halbouty, Meredith and Pan American, *almost as vigorously as it attacks the much smaller allowables granted to the wells drilled on the small tracts.*" (Pages 8 and 9)

We also point out that Petitioners' statement, at page 5 of their Petition, completely overlooks the fact that Henderson's regular sized units are composed of the more than four hundred town lot tracts, comprising approximately 950 surface acres, whose owners along with Henderson have endeavored to comply with the Railroad Commission proration unit rules (Rules 1 and 2 of its Order, see pages 27 and 28 hereof) of not more than one well per 160 surface acres (plus 10% tolerance). When considered in the light only of small tracts, this is really a case of several hundred acres of small tracts whose owners have endeavored to comply with Railroad Commission unit rule requirement versus 20 acres of small tracts whose owners have elected not to comply.*

* In its opinion the Texas Supreme Court said "the case here is principally one of small tracts that have been unitized against small tracts where owners have preferred not to unitize." Appendix, page 15a.

Henderson plead and proved that the order in suit would cause the loss by drainage of approximately 42% of its gas reserves remaining as of August 1, 1959, and that this drainage would flow in almost equal portions from the Henderson properties to the town lot wells of Petitioners, they being permitted under the order to produce 42.953 billion cubic feet of gas in excess of their reserves, and to the thin sand wells of other regular unit operators, they being permitted to produce 46.919 billion cubic feet of gas in excess of their reserves. See Henderson's Exhibits 62A and B and 63. Thus, even if no town lot wells were involved in this case, the order in suit would still be invalid as to Henderson because of the loss by drainage to the thin sand regular units.[9]

Such was the precise holding of the Texas Supreme Court in *Marrs* v. *Railroad Commission* (1944), 142 Tex. 293, 177 S.W. 2d 941. In that case the field was originally prorated as three separate fields, viz., the Gulf-McElroy, the McClintic, and the Church-Fields fields, but on March 5, 1941, the Railroad Commission declared all three to be one common reservoir. The Field was prorated on the basis of one-half per well and one-half for the acreage potential productivity as applied to unitized acreage. Marrs contended that the Church-Fields area was thin sand while their Gulf-McElroy area was thick sand; that the Church-Fields area was densely drilled and produced more heavily than the Gulf-McElroy resulting in a low pressure area in the thin sand part of the Field; that drainage was to this low pressure area and from Marrs' properties and that the proration order in suit continued rather than prevented this adverse drainage condition. The trial court made find-

[9] At page 31 of their original Brief filed in the Texas Supreme Court, Petitioners argued:

> "Actually it is also a fight between different owners of large tracts, as to how the allowable should be divided between the large tracts *even if the small tracts are disregarded.*"

ings of fact that drainage of oil from the Marrs' properties in the Gulf-McElroy area to the properties of others in the Church-Fields area was taking place and that 7 million barrels of oil had already been lost.

The Texas Supreme Court held the order invalid as applied to Marrs, saying:

> "As previously stated, this suit was brought both as a statutory suit under Article 6049c, Section 8, Vernon's Annotated Civil Statutes, to test the validity of the Railroad Commission's proration orders and as a bill in equity to restrain the Commission from restricting production in the field in such manner as to constitute a taking of plaintiffs' property without due process of law. It was charged that the orders of the Railroad Commission were invalid because they were unreasonable, arbitrary, and discriminatory, and amounted to a confiscation of petitioners' property. The suit was for the purpose of trying out these issues.
>
> "• • • Every owner or lessee is entitled to fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation. Gulf Land Co. v. Atlantic Ref. Co., 134 Tex. 59, 131 S.W. 2d 73; Railroad Commission of Texas et al. v. Gulf Production Co., 134 Tex. 122, 125, 132 S.W. 2d 254.
>
> "Under the findings of the trial court the allowables as fixed by the Railroad Commission for the two areas are entirely out of proportion to the potentials thereof. *They are not in proportion to the oil under the different areas. It is very evident that petitioners are not being permitted to mine their just proportion of the oil.* There is several times as much oil underlying petitioners' land as there is under the land in the Church-Fields area, yet those in the Church-Fields area are being permitted to mine nearly as much oil as are petitioners. As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves they could mine the oil under their land and thus prevent its escape to the adjoining area. But

the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another.

"• • •

"This is not a case of mere waste in which the Commission has exercised the sound discretion invested in it to conserve our natural resources. As previously stated, the orders of the Railroad Commission here complained of *have the effect of taking one's property and giving it to another under circumstances where the evidence shows that this is not necessary in order to conserve the natural resources.* In Thompson v. Consolidated Gas Co., 300 U.S. 55, 80, 57 S. Ct. 364, 376, 81 L. Ed. 510, 524, it was said: 'And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' See other authorities cited therein.

"It follows that the orders of the Railroad Commission here complained of are invalid, and the trial court properly struck them down."

Such holding of the Texas Supreme Court in the *Marrs* case was reaffirmed by such court in holding invalid another "⅓ - ⅔" gas proration order in *Atlantic Refining Company* v. *Railroad Commission of Texas* (1961), Tex. ..., 346 S.W. 2d 801.

2. *That the Texas Supreme Court reversed and rendered the judgment of the Trial Court "because there was an indication in the record by bill of exception that petitioners had been offered the rights to unitize or pool their lands with respondents' properties"* (p. 5) *and that this was the basis of the Court's decision* (p. 9).

It is submitted that no fair minded person could so construe the Texas Supreme Court's opinion, especially in

view of its statement contained in the same paragraph as its reference to Respondents' Bill of Exceptions in the District Court, that "no such problem is before us." Appendix p. 22a).

No such problem was before the Texas Supreme Court. The proration order in suit did not treat Petitioners unfairly; they sought to sustain it. Nor were Petitioners thereby required to accept proration on some basis other than the ½ - ½ formula because they had declined an opportunity to pool their small tracts with larger tracts. The Texas Supreme Court simply held that the proration order in suit was unreasonable, arbitrary and confiscatory as to Henderson, leaving it up to the Texas Railroad Commission to promulgate another order which will treat all parties (small large tracts, thick or thin sands) fairly and justly and being careful to make it clear that:

> "• • • the Court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors;"

and specifically, saying:

> "We are limited to passing upon the validity of the order as promulgated."

Previously, in *Atlantic Refining Company* v. *Railroad Commission of Texas* (1961), Tex. , 346 S.W. 2d 801, the Texas Supreme Court said:

> "• • • A court can only pass on the validity of a rule or order when properly presented to it for review. The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property. As is provided in said Article 6008, Section 22, the Commission is given broad discretion in accomplishing the purpose of giving each party an op-

portunity to produce its fair share of the gas in the reservoir."

3. *That "the operational effect of the Texas Supreme Court's decision is that the Railroad Commission's proration rules * * * in many oil and gas fields in Texas, involving thousands of operators and investors, have been declared invalid. * * *"* (Pages 5 and 6 of the Petition)

Any reader is at a loss to understand why Petitioners would make any such statement to this Court. Two of the same attorneys whose names appear on the Petition for Certiorari were attorneys of record in *Atlantic Refining Company* v. *Railroad Comm. of Texas* (1961), .. Tex. , 346 S.W. 2d 801, a case involving an identical gas proration formula also held invalid by this Court, wherein the same argument was made and the Texas Supreme Court made it clear that it was not going to entertain suits to set aside proration orders which had been in effect for long periods without complaint, saying:

> "We are in agreement * * * that where producers have acquiesced in and have failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain."

4. *To the effect that Petitioners will suffer "heavy financial loss * * * from a striking down of the 1/3-2/3 alocation formula."* (Page 9 of the Petition).

The true effect of the striking down of the order aparently will be to permit Petitioners to produce at a rate approximately 200% greater than under the order in suit. See page 7 hereof. This Court will not speculate as to the possible effect on Petitioners of the as yet unknown terms of such future order as the Texas Railroad Commission may hereafter promulgate.

As this Court said in *American Book Company* v. *Kansas*, 193 U.S. 49, 48 L. Ed. 613:

> "But that suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over, and is limited by, the conditions of the case now before us."

5. *The inference that Petitioners drilled their small tract wells before the administrative proceedings resulting in this litigation began.* (Pages 19 and 20 of the Petition).

The true facts are (as set out in some detail under Respondents' Statement of the Case below) that all of Petitioners' wells were commenced during the pendency of these proceedings and after Henderson's application for a change in field rules was filed and notice of the hearing given. This is what the Texas Supreme Court meant when it said that Petitioners "drilled their wells at their own risk." It meant that Petitioners voluntarily elected to drill all of their wells *pendente lite* and that there would be no loss in investments whatever to Petitioners (by reason of what the Railroad Commission may hereafter do as a result of the Texas Supreme Court's decision in the case), if Petitioners had awaited the outcome of these proceedings rather than having proceeded, either arrogantly or recklessly, *pendente lite*.

## RESPONDENT'S STATEMENT OF THE CASE

Field rules were first established for the Port Acres Field by an Order of the Texas Railroad Commission dated August 18, 1958, as a result of hearings held in April and May, 1958 (Pl. Ex. 1), and the first proration schedule issued by the Railroad Commission for these field rules was for the month of October, 1958. Pl. Ex. 11; Henderson Ex. 7.

Rule 1 of that order is the spacing rule and provides for the drilling of wells no nearer than 1320 feet to any other

well on the same lease or unit and no nearer than 330 feet to any property line. This rule also provides:

> "The aforementioned distances • • • are minimum distances to allow an operator flexibility in locating a well, and *the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each one hundred and sixty (160) acre proration unit.*"

Rule 2 of the same Order provides for standard proration units of 160 acres with allowance of additional tolerance acreage up to 10% of the standard unit so that the maximum size unit will not exceed 176 acres.

Rule 3 of the order of August 18, 1958 provides that the daily allowable production for each reservoir of the Port Acres Field will be divided among the wells completed in that reservoir on the basis of ⅓ of the total reservoir allowable being allocated equally among the wells and the other ⅔ divided among the wells in the proportion that the acreage assigned to each well "bears to the sum of the acreage in the reservoir."

Rule 4 of the Order specifies the casing and cement program.

Of these four Rules contained in the Commission's Order of August 18, 1958, only Rule 3, the gas allocation formula and any related provisions of the Order, were complained of by Henderson. No attack was made upon the spacing rule, the rule establishing the size of unit, or the rule establishing the casing and cement requirements.

At the time of the 1958 Railroad Commission hearings there were only six producing wells in the Field (S.F. 828; 1333) and only nine had been completed as of August 18, 1958 the date of the first proration order. Pl. Ex. 31. The first proration schedule issued under that order for October, 1958 shows that these nine wells were located on proration

units ranging in size from 118 acres, the smallest, to 176 acres, the maximum size unit, with the average being 158 acres. Pl. Ex. 11; Henderson Ex. 6. These wells were all located in the thin sand, eastern part of the Field, where there are no town lots or small tracts.[10] S.F. 810; 828-829; Pl. Ex. 28, 41 and 42; Henderson Ex. 51.

There was no tangible evidence at the time of the 1958 hearings that there was going to be a thick sand western portion of the Field in the area of the town lot subdivisions or that the discovery area, by comparison, would be in the thin sand. S.F. 828-829; 837.

Henderson completed its Judice No. 1 Well on October 28, 1958, during the first month of proration (Pl. Ex. 31), and shortly thereafter, *on November 21, 1958, prior to the hearing of any application for permit to drill any of the town lot wells,* Henderson filed its application with the Railroad Commission for an order discontinuing the 1/3 per well, 2/3 acreage, allocation formula, and prorating the Field on some reasonable basis. Pl. Ex. 2.

In January, 1959, the other Respondents herein and Humble Oil and Refining Company joined in the Henderson request for a change in Field Rules. *Thus, all of the then operators in the Field joined in the request for a change in Field Rules prior to the commencement and completion of any Rule 37 Wells.* The hearing on this application was held April 20, 22, 23 and 24, 1959, and was participated in by Petitioners and their attorneys. Pl. Ex. 15. At this time 20 wells had been completed in the Field, *all*

[10] Throughout this Brief we will refer to wells drilled and authorized to be drilled under exceptions to the spacing rule as "small tract wells," "town lot wells," or "Rule 37 Wells." A total of 40 such Rule 37 Wells had been permitted as of the date of trial (Henderson Ex. 52), and as of that date, 20 such wells had been drilled and were on the proration schedule. Henderson Ex. 31. Such Exhibit indicates that the average size unit for the 20 wells was slightly less than one acre.

*on units of 118 acres or more, and no town lot wells had been completed.* Pl. Ex. 31; Henderson Ex. 13 and 14.

By the time of the April 1959 hearing, it had become apparent that the Field was not to be confined to the large tract units of the original wells (Henderson Ex. 7), all located in the eastern part of the Field as presently known. (S.F. 828; Henderson Ex. 34), but was extending in a westerly direction across various town lot subdivisions in and around the town of Port Acres, Texas. (See Pl. Ex. 19 for these various subdivisions, and Henderson Ex. 34 for a base map of the Field). It had further become apparent that the eastern part of the Field was a thin sand area, and the new western part a thick sand area, and that the tremendous withdrawals from the original wells located in the thin sand, eastern part of the Field had caused a low pressure area to develop, with the western part of the Field registering pressures several hundred pounds greater than the eastern portion. S.F. 805, 810, 828.

Against this background, at the 1959 hearing the Railroad Commission was requested *by all producers* to establish a proration formula based upon relative acre feet of productive sand for the various units as determined by net effective feet of sand in the well bore multiplied by the productive acres assigned to the well. S.F. 227; Pl. Ex. 9, 15, 17.

Although all of the then operators of wells in the Field requested similar relief and no town lot wells were then completed in the Field, the Commission refused to change its $\frac{1}{3}$ per well, $\frac{2}{3}$ acreage, proration formula, and this appeal resulted. Subsequent to the hearing, 30 small tract permits were applied for and granted, and by the time of the trial of the appeal from the Commission's order in the District Court, approximately 22 of the 40 outstanding small tract permits had been drilled. Henderson's Ex. 52; S.F. 126; Pl. Ex. 53; Def. Ex. 17. Of these 22 town lot wells, a total of 19 of them are actually located within the exterior

boundaries of or immediately adjacent to four of Henderson's Units. Henderson Exs. 41-48, incl.

The record shows that at the 1959 Railroad Commission hearing Respondent Michel T. Halbouty made the following offer, prior to the completion of any of Petitioners' small tract wells:

> "To avoid the necessity of town lot or small tract drilling in the Port Acres Field in order to recover the minerals underlying such lot or tract, Michel T. Halbouty is entirely willing to pool and unitize his leases with others, in order to form drilling units conforming to the pattern established by the Railroad Commission of Texas. He accordingly offers and agrees in all instances where he owns leases on acreage and units hereafter formed in the Port Acres Field, to pool and unitize his leases with other leases and acreage in such unit, and to pay and bear his ratable share of the cost of drilling and operating costs. As to units which he may form and drill, he agrees to carry any other owner of less than 5 per cent of the leases or acreage in the unit, and to look solely to the production for the recovery of his well costs and operating expenses." (S.F. 644-645).

Respondent Henderson made the same offer. S.F. 668.

In response, Petitioners did not offer evidence as they could have done but asserted their position to be that the pooling offers were "immaterial to this hearing, wholly immaterial." Pl. Ex. 15, page 465. The same position as to the offers to pool was taken by Petitioners in the District Court when they objected to the materiality of evidence thereof on the ground that "the owners of so-called small tracts have a right as a matter of law to develop their tracts separately, and the offer to pool *on any basis* of acreage or otherwise *is immaterial.*" S.F. 639.

As the Texas Supreme Court states in its opinion, "the basic facts are not substantially in dispute." (Appendix,

p. 11a). Under Petitioners' evidence an average one acre town lot tract has reserves of gas and liquid hydrocarbons having a value of only $50,867 (Def. Ex. 22; S.F. 1204; 1252), yet a well on such a tract under the proration formula in suit will be permitted to produce gas and liquid hydrocarbons having a value of $407,501 (Defs. Ex. 21), resulting in the drainage of $356,634[11] in gas and liquid hydrocarbons from other properties per small tract well. Under Henderson's evidence, the value of the gas and liquids drained from the Henderson properties alone over the remaining life of the field will amount to $13,450,000. S.F. 808; 821-822.

The fact of such drainage caused by the order held invalid by the Texas Supreme Court is not in dispute. In the "Reply Brief for Appellees H. L. Dillon, Jr. et al.," filed in the Texas Supreme Court, Petitioners say:

> "• • • we have of course made it clear that under the 1/3-2/3 formula each of the town lot wells will produce more than the equivalent of the gas and condensate originally in place beneath the tract on which the well is drilled." (Pages 11, 12).

Petitioners then state their position to be that they are entitled to drain the properties of others to the extent necessary to enable them "to pay the cost of drilling and operating, plus a reasonable profit." See full quotation on pages 11 and 12 hereof.

The Supreme Court of Texas found that "each 1-acre lot depends upon drainage for 92.87% of its gas recovery and 90.63% of its condensate recovery." (Appendix, page 12a). Petitioners contended they had a "property right" to exact

[11] Petitioners' witness obtained these values by pricing gas at 12.7¢ per MCF. Henderson's average contract price over the term of its gas sales contract was 17¢ per MCF; If such price is applied to Petitioners' quantities the value of the gas and liquids each such well will drain is approximately $584,000 or approximately $12,848,000 for the 22 town lot wells.

such drainage. The Supreme Court of Texas has held that there is no such property right in Texas and a proration order permitting drainage to such extent is invalid. Nothing else was decided by the Texas Supreme Court. Nothing else is therefore before this Court. Thus, we submit, this case has been decided by the Texas Supreme Court solely on the basis of non-federal grounds. *Cf. Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1956), 206 U.S. 1, 51 L. Ed. 933.

No discussion of any constitutional issues now attempted to be raised by Petitioners is to be found in the opinion of the Texas Supreme Court. No attempt to raise any such constitutional issues were made by Petitioners prior to their Amended Motion for Rehearing. No opinion was rendered by the Texas Supreme Court in its Order dated May 23, 1962, overruling Petitioners' Amended Motions for Rehearing.[12]

## RESPONDENT'S REPLY TO PETITIONERS' REASONS FOR ALLOWANCE OF THE WRIT

Under this heading Petitioners attempt to assign four reasons for allowance of the writ. We will reply to these "Reasons" in the order as set out in the Petition:

1. Petitioners say they are entitled to a new trial under the doctrine of *Saunders v. Shaw*, 244 U.S. 317, 61 L. Ed. 1163, because they were deprived of an opportunity to present evidence "on the fairness and validity" of the offers to pool made at the Railroad Commission hearing.

No such issue was before the Court. Such an issue could only have arisen if, instead of refusing to continue the

[12] In *McMillen v. Ferrum Mining Company* (1904), 197 U.S. 343, 49 L. Ed. 784, this Court held that a Federal question first raised by a petition for rehearing in the highest State Court is too late to support the appellate jurisdiction of the Supreme Court of the United States, where the State Court, in denying the petition made no reference to the Federal question.

1/3-2/3 order in effect, the Railroad Commission had (i) granted Henderson's application to cancel the 1/3-2/3 formula, (ii) entered a new proration order which was unsatisfactory to Petitioners, and (iii) ruled that Petitioners would receive no greater allowable than as permitted by such order because, before drilling their wells, they had received but declined to accept, reasonable offers to pool their small tracts with the lands of others into regular sized units. None of these things occurred. The Railroad Commission refused to change its method of proration regardless of the drainage consequences to Henderson or any other regular unit operator: A disposition of the case entirely satisfactory to Petitioners.

Under the laws of Texas, the Texas Railroad Commission is the primary fact finding agency and the Courts are not permitted to pass upon a material issue not first passed upon by the Commission.

As the Court said in *Gulf Land Company* v. *Atlantic Refining Company* (1939), 134 Tex. 59, 131 S.W. 2d 73 (and in numerous other cases):

> "• • • the Commission • • • must be • • • the primary, or original, statutory fact finding agency.
>
> "• • • the law contemplates that the Commission shall be left free to finally determine controverted issues of fact. • • • "

and, after referring to its holding in *Magnolia Petroleum Co.* v. *Railroad Commission*, (1937) 130 Tex. 484, 109 S.W. 2d 967, such Court said:

> "We still adhere to the above holdings. They mean that we will sustain a Commission order if it is correct on any theory of law applicable to the case, and that regardless of whether or not the Commission gives a

correct legal reason for such order, or whether or not it gives any reason at all therefor.

*"Such rule, however, cannot mean that the District Court can determine a material controverted fact question which was not passed on at all by the Commission in order to sustain a Commission order."*

In *Shell Petroleum Corporation* v. *Railroad Commission*, Tex. Civ. App. (1939), 133 S.W. 2d 194, writ refused, it was held that the Court would not pass upon the right of a tract, considered as a part of a larger tract from which it was subdivided, to a well permit since no such issue was passed upon by the Commission.

In *Humble Oil & Refining Company* v. *Bennett*, Tex. Civ. App. (1941), 149 S.W. 2d 220, the Court held that where it did not apear whether or not the Commission passed on the question of limiting the depth of a drilling permit, such question is for the Commission and not the Courts. The Court said:

"Appellants' relief in this regard would be for the Commission to determine. It does not appear whether their protests in this regard were made before the Commission, nor that the Commission passed upon the question. * * * It not apearing that the Commission passed upon this contention, it is not before us for determination here."

In *Railroad Commission* v. *Wencker* (1943), 140 Tex. 527, 168 S.W. 2d 625, the Supreme Court of Texas said:

"The Railroad Commission is given the power to determine primarily all fact issues, that is, all issues that are not established as a matter of law, and to permit the Courts to pass upon a question not passed on by the Commission would violate such power."

Thus, since the Railroad Commission did not pass upon the validity and effect of the pooling offers, the Texas

Supreme Court could not remand the case to the District Court for it to receive evidence thereon. As the Texas Supreme Court said, "No such problem is before us." It further made clear the basis of its judgment when it summarized the effect of its holding in the next to last paragraph of its opinion as follows:

> "From the foregoing it follows that the ⅓-⅔ proration formula is invalid *in that it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent.*" (Appendix, p. 22a).

This holding, which has nothing whatever to do with the offers to pool, was urged by Henderson throughout the proceedings in the District Court and in the Texas Supreme Court, and could not have come as any surprise to Petitioners. *Cf. Butler Bros.* v. *McColgan* (1942), 315 U.S. 501, 86 L. Ed. 991, holding that the doctrine of the *Shaw* case does not apply when there is no element of surprise.

See also, *McMillen* v. *Ferrum Mining Co.* (1904), 197 U.S. 343, 49 L. Ed. 784, cited at page 33 hereof; and *American Surety Co.* v. *Baldwin* (1932), 287 U.S. 156, 77 L. Ed. 231, holding that the doctrine of the *Shaw* case does not apply when, as here, the question is first raised by a petition for rehearing of an appeal to the highest court of the State. These cases also stand for the proposition that where the objection to evidence is made on a non-federal ground, as here. (Petitioners merely objected on the ground that the evidence tendered by Respondents was immaterial), it is too late in a Motion for Rehearing to attempt to raise objections on constitutional grounds. As we have heretofore pointed out Petitioners will obtain their new trial upon the new field rule hearing to be held by the Texas Railroad Commission.

2. We are not entirely certain what "Reasons for Allowance of the Writ" are intended to be included under Section 2, beginning on page 14. of the Petition, unless it be Petitioners' continued insistence that the Texas Supreme Court held that the District Court erred in refusing to receive evidence of Henderson's offer to pool its leases with the numerous small tracts of Petitioners located within and adjacent to the exterior boundaries of the Henderson units, and declared the present proration order of the Commission invalid on the ground that Petitioners should have accepted Henderson's offer.

The Court's opinion is susceptible of no such interpretation, and no such holding was required of it.

As is clear from the Court's opinion, it held that Article 6008, Texas Civil Statutes, requires the Texas Railroad Commission to allocate permitted gas production in such manner as will prevent, rather than cause, drainage; that the order in suit did not comply with this requirement and was therefore invalid as to Henderson and other Respondents. It expressly refused to dictate the terms of any future order and left this to be decided by the Texas Railroad Commission after notice and hearing to all interested parties as required by the statute. If any such future order treats both Petitioners and Respondents fairly and justly, as the Court assumes will be the case, then it will remain immaterial whether or not Petitioners were offered a fair and reasonable opportunity to pool their small tracts with the larger tracts of others. On the other hand, if any such future order of the Commission is in any manner predicated on whether or not Petitioners did or did not receive, or do or do not hereafter receive, a reasonable offer to pool, then that issue can be litigated by Petitioners if they are dissatisfied with the Commission's disposition of the case. See Section 8 of Article 6049c, Texas Civil Statutes. Appendix, page 39a.

Nothing this Court said or held in *Thompson* v. *Consolidated Gas Utilities Corp.* (1936) 300 U.S. 55, 81 L. Ed. 510, could possibly aid or comfort the Petitioners' contentions. The quotation from that case, appearing at page 15 of the Petition for Certiorari, carefully omits the immediately preceding sentence, which was:

> "Prior to the enactment of House Bill 266 (an amendment of Article 6008, the Texas gas proration statute), the property rights of the plaintiffs were substantially those conferred by the common law of the State."

Petitioners also choose to omit from their quotation the following portion of the Court's opinion:

> "It may be assumed that House Bill 266 *should be construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas to their justly proportionate shares thereof, free of drainage to neighboring lands.*"

That is precisely the holding of the Texas Supreme Court in the instant case.

As to Petitioners' argument regarding the meaning and effect of Articles 6008b and 6014, relating to pooling, we simply say that these are local, non-federal questions which, contrary to Petitioners' contentions, the Texas Supreme Court did not and had no occasion to decide under the facts of this case and which in any event, this Court will not decide. *Walters* v. *City of St. Louis* (1953), 347 U.S. 231, 98 L. Ed. 660; *United Gas Public Service Co.* v. *Texas* (1937), 303 U.S. 123, 82 L. Ed. 702; *Railroad Comm. of Texas* v. *Pullman Co.* (1940), 312 U.S. 496, 85 L. Ed. 971; *Atlantic C. L. R. Co.* v. *North Carolina Corp. Comm.* (1906), 206 U.S. 1, 51 L. Ed. 933; *Nelson* v. *County of Los Angeles* (1960), 362 U.S. 1, 4 L. Ed. 2d 494, *Clay* v. *Sun Insurance Office, Ltd.* (1960), 363 U.S. 207, 4 L. Ed. 2d 1170; *Scripto,*

*Inc.* v. *Carson* (1960), 362 U.S. 207, 4 L. Ed. 2d 660. However, the Court will note that paragraph (g) of Article 6014, cited by Petitioners, passed in 1931 (Acts, 42nd Tex. Leg., 1st C.S., 1931, page 46), relates to *oil pools*. Gas proration is governed by Article 6008, Texas Civil Statutes, and pooling authorization by Article 6008b, passed in 1949 (Acts 51st Tex. Leg., 1949, p. 477, Ch. 259). If paragraph (g) of Article 6014 ever applied to gas pools, which we deny, it is superseded by Articles 6008 and 6008b, subsequently enacted.

Petitioners' contention that the statutory authority of the Texas Railroad Commission to prorate gas is not reasonably definite and certain is likewise invalid. In *Corzelius* v. *Harrell* (1944), Tex. Civ. App., 179 S.W. 2d 409, in discussing the Texas gas proration statute the Court quoted with approval the following portion of the Court's opinion in *Henderson* v. *Terrell* (1938), 24 F. Supp. 147, 153:

> "'We think the statute is simply and clearly phrased to give effect to a public policy, and to exercise the police power in respect to matters which the courts of Texas and of the United States uniformly hold it is the right of the state by statute, to control. *This right extends to preventing one person from unduly draining from under the lands of another, oil and gas lying in a common pool equally when the undue drainage is for, for wasteful uses, and when the rule of capture no longer applying, because of lawful statutory limitation, one of the owners, by drawing more than his due proportion of the limited share, is draining the lands of his co-owners.*
>
> "We find nothing unreasonable in the statute,[13] nothing unreasonable in the orders. For all that the statute does, all that the orders do, is to make limitation and

[13] A different statute was under consideration in *Henderson* v. *Terrell*, but the Court held the governing principals to be the same.

> proration effective by putting an end to an existing unreasonable drainage condition, and preventing its continuance in the future. Neither the statute nor the order operates retrospectively, either punitively or reparatively; both operate prospectively. So operating, they merely say to plaintiffs 'you may produce from your wells of the total amount limited in a due proportion with every other well in the field. You may not produce more.'";

and then said:

> "The decision in that case rests, in our opinion, upon sound and well established legal doctrine which controls the issues in the instant case."

Subsequently, in *Atlantic Refining Co.* v. *Railroad Commission of Texas* (1961), .. Tex. ...., 346 S.W. 2d 801, the Texas Supreme Court said:

> "While the Supreme Court granted a writ of error in the Corzelius case and dismissed it as moot in 186 S.W. 2d 931, the opinion of the Supreme Court did not in any way disturb the holding of the Court of Civil Appeals."

3. The Supreme Court of Texas did not hold (as asserted by Petitioners at page 19 of the Petition) that Petitioners drilled their wells at their own risk because they "guessed wrong on whether they should accept offers to unitize or go ahead and develop their tracts separately." The Supreme Court of Texas held that Petitioners drilled their wells at their own risk because of the fact that all of their wells were commenced and completed *pendente lite*; the undisputed evidence being that:

> (i) All except one (it being filed November 10, 1958) of Petitioners' applications for permits to drill their wells were filed with the Railroad Commission (see Henderson Ex. 52) *after* the filing of Henderson's application of November 19, 1958 (Pl. Ex. 2) to the Railroad Commission to set aside the ⅓-⅔ proration for-

mula, and *after* the notice of hearing issued on that application on November 21, 1958 (Pl. Ex. 3);

(ii) All of the hearings held by the Railroad Commission on Petitioners' applications for permits to drill their wells were held *after* the filing of Henderson's application for a change in Field Rules and *after* the issuance of notice of such hearing (Henderson Ex. 52);

(iii) All of Petitioners' wells were completed *after* the hearing held April, 1959, on Henderson's application to set aside the ⅓-⅔ proration formula (See Pl. Exs. 31 and 32); a hearing attended by Petitioners and their attorneys (Pl. Ex. 15).

In fact, of the 22 town lot wells, *20 of them were actually completed* after the filing of the appeal from the Commission order in the District Court on August 14, 1959. Pl. Exs. 31 and 32.

Likewise, the assertion (at page 19 of that Petition) that the Texas Supreme Court "has denied a hearing to Petitioners on the issue of unitization" is not correct. As previously pointed out at page 33 hereof, no such issue was in the case. When and if under some future order[14] of the Texas Railroad Commission. Petitioners are put to the choice of accepting unitization or not, it is manifestly clear that the test to be applied to Petitioners will be the same as that applied in this case to test the validity of the Commission's orders as to these Respondents, viz., Are Petitioners thereby afforded a reasonable opportunity to recover the minerals underlying their land or their equivalant? This is the full extent of their rights under Texas law and the criteria that will be applied to any future order of the Railroad Commission affecting those rights.

[14] For an example of the type of order entered by The Texas Railroad Commission after the Texas Supreme Court's decision in *Atlantic Refining Company* v. *Railroad Commission of Texas* (1961), .... Tex. ...., 346 S.W. 2d 801, holding invalid a 1/3 - 2/3 proration order for another Field, see p. 26a of the Appendix hereof.

As the Supreme Court of Texas said nearly 30 years ago in *Brown* v. *Humble Oil & Refining Company* (1935), 126 Tex. 296, 83 S.W. 2d 935, 99 A.L.R. 1107:

> "• • • *It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions.*
>
> "• • •
>
> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than prescribed therein. Also, conditions may arise where it would be proper, right, and just to permit tracts to be subdivided and such subdivisions drilled after the adoption of the rule; *but in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalant in amount to the recoverable oil and gas under his land.* • • •
>
> "The commission, in order to prevent waste, has the power to limit the rate of flow in the same way that it has the power to regulate spacing. See Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403; Danciger Oil & Refining Co. v. Railroad Commission (Tex. Civ. App.) 49 S.W. (2d) 837. This right to control the rate of flow in order to prevent waste also *enables the commission to offset the advantage obtained by one who is given an exception to the spacing rule by limiting his allowable production to the extent necessary to overcome this advantage.* • • • No unreasonable hardships need result, if the rule is faithfully and impartially applied by those authorized by law to administer it."

It is not correct (as Petitioners assert at page 20 of their Petition) that "there was no way whereby Petitioners could get a judicial determination in advance as to whether they were right in deciding to spend millions of dollars in drilling their wells." Petitioners could simply have awaited the outcome of these proceedings then pending.

4. Petitioners' fourth "Reason for Allowance of the Writ" appears to be that having received permits to drill their wells they have a vested right thereunder to an allowable sufficient to "enable them to get back their drilling costs, operating expenses, and * * * a reasonable profit."[15] The Supreme Court of Texas has said their drilling permits gave Peittioners no such rights; it said:

> "It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying their properties and not for the purpose of enabling them to drain the minerals underlying adjoining lands to pay the cost of their operations plus profits."

So it appears that under Texas law Petitioners have no such rights; and as Petitioners agree in their Conclusion (Petition, page 22), they must accept the decision of the Texas Supreme Court "as *final on matters within the state's exclusive control.*" Is this not such a matter? In *Ohio Oil Company* v. *Indiana* (1899), 177 U.S. 190, 44 L. Ed. 729, this Court held that it was incumbent upon a state when it undertook to limit the production of oil and gas to provide protection to all of the owners of rights in a common pool "by securing a just distribution" thereof and "preventing it from being taken by one of the common owners without regard to the enjoyment of the others." Here the

[15] A permit, such as a building permit or well permit, from a municipal or political subdivision, has no relation to whether a profit will be made from the building or well.

State, through its Supreme Court, has exercised judicial power to prevent that which this Court said in *Ohio Oil Company* v. *Indiana* a state must prevent.

The Supreme Court of Texas says the test to be applied is "to each his own." Petitioners say the test to be applied is drainage to recover costs.[16] But such a test could only apply to those operators like Petitioners who have insufficient reserves of their own. An additional test would have to be devised to apply to the operators having more than sufficient reserves to recover their costs to determine how much of the costs of the deficiency operators they must bear, respectively, and how much of the remaining reserves, if any, they would be permitted to produce as compared to other operators similarly situated.

Petitioners have no such vested rights. As the Supreme Court of Texas said in *Gulf Land Company* v. *Atlantic Refining Company* (1939), 134 Tex. 59, 131 S.W. 2d 73:

> "It is the law that every owner or lessee of lands is entitled to a fair chance to recover the oil and gas in or under this land, or their equivalent in kind. Any denial of such fair chance would be 'confiscation'."

Thus, if Petitioners should be permitted to produce more than their limited town lot reserves by drainage from Henderson's properties, as will be the case under the order in suit, it is Henderson whose property would be confiscated; not Petitioners, and this will not be permitted under Texas law.

But as we said before and as this Court has held, these are State, not federal matters, and Petitioners are, as they say, conclusively bound by the Judgment of the Supreme Court of Texas with respect thereto. As this Court said

---

[16] Costs of wells vary widely and give no standard; an example being that one well in this Field cost $197,000, while another cost in excess of $500,000. S. F. 814. Operating costs also vary considerably. S.F. 839, 849.

in *Railroad Commission of Texas* v. *Rowan and Nichols Oil Co.* (1940), 311 U.S. 570, 85 L. Ed. 358:

> "* * *. In any event, a state's interest in the conservation and exploitation of a primary natural resource is not to be achieved through assumption by the federal courts of powers *plainly outside their province and no less plainly beyond their special competence. The Fourteenth Amendment was not intended for such ends.*"

and in *Bell Telephone Co.* v. *Pennsylvania Public Utility Commission* (1939), 309 U.S. 30, 84 L. Ed. 563, this Court said:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

Finally, we refer this Court to its holding in *Southwestern Bell Tel. Co.* v. *Oklahoma* (1937), 303 U.S. 206, 82 L. Ed. 751, wherein it is said:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of the court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

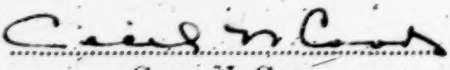
It is submitted that no federal question was presented to or decided by the Texas Supreme Court in this case and that (the Texas Railroad Commission being the only necessary party defendant to the suit) the case would have

been decided precisely the same as it was with or without Petitioners in this suit and with or without the town lot well question (the thin sand versus thick sand question requiring in itself the same result).

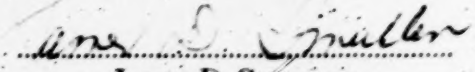
## CONCLUSION

As we said at the outset, Henderson's damages by the delay incident to Petitioners' appeal are estimated to be on the order of $1,000,000 per year or $2,600.00 per day. On the other hand, as set out at page 7 hereof, Petitioners will gain approximately 200% in their rate of production by having no proration order in effect. We pray that the Court will speedily deny the Petition for Certiorari so that the Texas Railroad Commission may proceed to call another hearing and thereafter promulgate a just and reasonable proration order for all producers in this Field.

Respectfully submitted,



CECH N. COOK



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I, James D. Smullen, an attorney for Respondent Peter Henderson Oil Company, depose and say that I have this day served copies of the foregoing Brief of Respondent Peter Henderson Oil Company in Opposition to the Petition for Writ of Certiorari and the Appendix thereto, by mailing the same by United States Certified Mail, Return Receipt Requested, to the following counsel of record in said cause:

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Subscribed and Sworn to before me on this the 21st day of September, A.D. 1962.

Notary Public in and for
Harris County, Texas

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IN THE
SUPREME COURT OF TEXAS

No. A-8200

| | |
|---|---|
| MICHEL T. HALBOUTY ET AL., *Appellants*, vs. RAILROAD COMMISSION OF TEXAS ET AL., *Appellees*. | On Direct Appeal from Travis County. |

Michel T. Halbouty and others bring this direct appeal from a decree of the trial court upholding certain orders of the Railroad Commission of Texas and denying to the appellants a permanent injunction and all other relief prayed for.

In the trial court the appellants sought to restrain the Railroad Commission from continuing in effect the allocation formula adopted August 18, 1958, for the Port Acres Field in its order #3-38,395 which reads as follows:

> "RULE 3. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production, after deductions have been made for wells which are incapable of producing their gas allowables, among the individual wells in the following manner:
>
> "(a) Two-thirds (⅔) of the allowed gas production from a non-associated gas reservoir shall be allocated to the individual wells completed therein in that proportion that the acreage assigned to each such well bears to the sum of the acreage in the reservoir.
>
> "(b) One-third (⅓) of the allowed gas production from a non-associated gas reservoir shall be

allocated equally among the individual wells completed therein.

"(c) The total daily non-associated gas allowable for each well shall be the sum of its acreage and per well allowables."

They also prayed that the Commission be further enjoined from allowing the marketing of gas from the Port Acres Field until the Commission required the operators in the field to maintain the pressure at such point as would permit the maximum recovery of hydrocarbons contained in the reservoir and to prevent unnecessary waste of those natural resources.

The trial court sustained exceptions to the pleadings in so far as they were directed to the refusal of the Railroad Commission to enter the compulsory cycling and pressure maintenance order and found and concluded that the order of the Commission otherwise complained of was reasonably sustained by substantial evidence and is lawful and valid.

At the outset the Railroad Commission and the other appellees vigorously challenge our jurisdiction of this direct appeal on the ground that such appeal will lie only where the purpose of the suit is to restrain action or threatened action on the part of the Commission and not when the object of the suit is to compel action. In other words they say that the real purpose and object of this suit is to compel the Railroad Commission to enter a new proration order and to order cycling and pressure maintenance in the Port Acres Field.

To support their position in this respect they rely on our decision in Boston v. Garrison, 152 Tex. 253, 256 S.W. 2d 67. That suit as first filed sought to restrain the officials of the Department of Public Safety from suspending a chauffeur's license. Prior to the trial the license had expired and plaintiff, by an amendment to his petition, sought

to compel the department to renew the old or issue a new license. We held that a direct appeal would not lie in that respect and that his only redress was in the nature of a mandamus. We did not hold that we would not have jurisdiction of the appeal from the refusal of the trial court to restrain the department from suspending the license but that matter had become moot.

In the case here the appellants assert that the proration formula of one-third and two-thirds is unjustified, unreasonable and invalid and of that issue we do have jurisdiction. Incidentally, a striking down of this proration order would, in the natural course of things, enjoin upon the Railroad Commission the duty to write a new order, but it is not within the scope of our jurisdiction here to direct the Commission in that regard. What we have before us is the validity vel non of the order as written. Railroad Commission v. Sterling Oil & Refining Co., 147 Tex. 547, 218 S.W. 2d 415; Board of Water Engineers v. Colorado River Municipal Water District, 152 Tex. 77, 254 S.W. 2d 369; Texas & N. O. Ry. Co. v. Railroad Commission, 155 Tex. 323, 286 S.W. 2d 112; Railroad Commission v. Shell Oil Co., 146 Tex. 286, 206 S.W. 2d 235.

Article 1738a, Vernon's Ann. Civ. Stat., reads in part as follows:

> "* * * appeals may be taken direct to the Supreme Court of this State from any order of any trial court granting or denying an interlocutory or permanent injunction * * * on the ground of the validity or invalidity of any administrative order issued by any State Board or Commission under any statute of this State. * * * *"

The article further provides that the Supreme Court shall prescribe the necessary procedural rules to be followed in perfecting such appeal. Pursuant to that directive, Rule 499-a was adopted.

In Atlantic Refining Co. v. Railroad Commission of Texas, ... Tex. ..., 346 S.W. 2d 801, our jurisdiction of the direct appeal was attacked and while we did not there discuss the question of jurisdiction that decision by implication holds contrary to appellees' contention.

"In so far as appellants complain of the refusal of the Railroad Commission to require compulsory cycling and pressure maintenance in this field is concerned, we do not have jurisdiction of the appeal. The jurisdiction of the Supreme Court on direct appeal is dependent upon and limited to the wording of the Constitutional Amendment, Art. 5, § 3b, and Art. 1738a, Vernon's Ann. Civ. Stat. While in the trial court appellants prayed for an injunction to restrain the Commission "from approving or allowing the withdrawals of gas to market from the Port Acres Field in such quantity and under such conditions as will result in the preventable waste of the hydrocarbon content of such gas until such time as the Commission has duly entered an order or orders requiring the operators in such field to maintain the pressure in the field at a point which will permit the maximum recovery of the hydrocarbons contained in the reservoir to the end that preventable waste of such natural resources shall be prevented," nevertheless the actual relief sought was to require the Commission to enter a compulsory cycling and pressure maintenance order. It was so considered and treated by the Commission.

These proceedings were instituted before the Commission in the following manner: On November 19th, three months after the adoption of Special Order No. 3-38,395, Peter Henderson Oil Company requested that the Commission hold a hearing to reconsider and amend Rule 3 thereof. Notice was given that the hearing was set for January 27, 1959. On January 22nd Halbouty and Meredith joined in the Henderson Company request and asked that the issues

be broadened to include the question of whether recycling or other secondary recovery operations should be instituted and conducted. On January 23rd Pan American joined in the Halbouty-Meredith request. On July 6, 1959, after hearing and consideration, the Commission notified all parties of its action as follows:

> "This is to advise that the Commission, at a formal conference held July 6, 1959, denied your application for a mandatory cycling order for the Port Acres (Lower Hackberry) Field, Jefferson County, Texas.
>
> "The Commission further denied your application for an allocation formula based on net acre feet for the subject field and ruled that the allocation formula based on ⅔ acreage and ⅓ per well shall continue to remain in effect."

In Boston v. Garrison et al., supra, under the direct appeal provision it was pointed out that the Supreme Court does not have jurisdiction where the purpose of the suit is to require or to compel action although the relator prayed "that mandatory injunction shall issue requiring the defendants to issue plaintiff renewal license or provisional license." That in effect was an application for mandamus to compel the department to issue the license.

In Lane v. Ross, 151 Tex. 268, 249 S.W. 2d 591, the relators prayed that the respondent be ordered and commanded not to transmit to the chairman of a state political committee certain minutes and returns of election and that the respondent be ordered to transmit certain other minutes and returns. We held that in this original action this court did have jurisdiction to issue a writ of mandamus but no jurisdiction to grant injunctive relief and since there appeared to be no need for issuance of the mandamus the petition was dismissed.

In Boston v. Garrison we said:

"• • • In that case [Lane v. Ross] there was jurisdiction to issue the writ of mandamus but no jurisdiction to issue a writ of injunction, and because of the want of jurisdiction the injunctive relief was denied. Here, assuming that constitutionality or validity is properly involved, the court has jurisdiction on direct appeal from an order or judgment granting or denying an injunction, but no jurisdiction on direct appeal from an order or judgment granting or denying mandamus."

So here an application to restrain the Commission from allowing gas to be marketed until the Commission has entered an order requiring recycling of gas is the equivalent of an application to have the court compel the Commission to enter the recycling order. The appeal to the district court lay from two separate and distinct and severable orders of the Commission. A combination of the two complaints in one cause would not serve to give us jurisdiction where otherwise it would not attach.

It appears that the Port Acres Field produces only gas and condensate. It embraces an area of approximately 3,000 acres. The discovery well was completed in 1957. The production is from sands at a depth of something over 10,000 feet. The Commission, in its special order for this field adopted the following spacing rule:

"Rule 1. No gas well shall hereafter be drilled nearer than thirteen hundred and twenty (1320) feet to any well completed in or drilling to the same reservoir on the same lease, unitized tract or farm, and no well shall be drilled nearer than three hundred and thirty (330) feet to any property line, lease line or subdivision line; provided, however, that the Commission will, in order to prevent waste or to prevent the confiscation of property grant exceptions to permit drilling within shorter distances than herein prescribed whenever the Commission shall have determined that such exceptions are necessary either to prevent waste or to prevent the con-

fiscation of property. When exception to this rule is desired, application therefor shall be filed and will be acted upon in accordance with the provisions of Commission Statewide Rules 37 and 38, which applicable provisions of said rules are incorporated herein by reference.

"The aforementioned distances in the above rule are minimum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each one hundred and sixty (160) acre proration unit."

Thus the Commission determined that one well to 160 acres would effectively recover all of the hydrocarbons contained in the field reservoir.

At the time of the trial there were said to be 25 producing wells on large units or tracts and 22 producing wells drilled under permits issued as exceptions to Rule 37.

This suit was brought by Pan American Petroleum Corporation, Michel Halbouty and Meredith and Company. Peter Henderson Oil Company intervened and these four are appellants. A number of the small tract owners intervened and aligned themselves with the Commission. They are H. L. Dillon, Jr., H. C. Barnes, Tyrell-Combest Realty Company and P. G. Lake, Inc. Most of the small tract owners in this field have entered into unitization agreements. For instance, the Peter Henderson Oil Company units, three in number, consist of several hundred small tracts. The 22 Rule 37 wells are situated on tracts ranging from 2/10ths of an acre up to 5 acres; 16 embraced less than one acre and 10 less than one-half acre.

The principal contention urged by the appellants is to the effect that the proration formula in this field allocating production on a basis of one-third per well and two-

thirds on the amount of acreage in the tract is not reasonably sustained by substantial evidence, but on the other hand is arbitrary, unreasonable and confiscatory of appellants' property. Under the record before us we are of the opinion that this case is controlled by our recent decision in Atlantic Refining Co. v. Railroad Commission, ..... Tex. ....., 346 S.W. 2d 801 (hereinafter referred to as Normanna) and the point is therefore sustained.

The Attorney General in his brief for the Railroad Commission squarely points up the real issue before us that goes to the heart of this case. He says "that townsite operators do have a property right in the reserves underlying the large tract owners, and that that right extends to the right to drain enough oil or gas from other tracts in the field to yield a reasonable opportunity for a profit to the operator." The other appellees also assert that right.

In other words, since the owner of a tract, no matter how small, is entitled to one well to prevent the confiscation of the gas underlying his tract, he, therefore, becomes entitled to confiscate gas from adjacent properties sufficient to pay the cost of his drilling operations and return a reasonable profit. In support of that proposition he cites only Railroad Commission v. Humble Oil & Refining Co., Tex. Civ. App., 193 S.W. 2d 824, wr. ref. n.r.e., [the Hawkins case] where the following statement is to be found:

> "As a corollary to these rules, it is held that the owner of an 'involuntary' segregated tract cannot be denied the right to drill at least one well on his tract however small it may be. From which it would seem that his allowable can not be cut down to the point where his well would no longer produce, (See Railroad Commission v. Mackhank, Tex. Sup., 190 S.W. 2d 802) nor below the point where it could not be drilled and operated at a reasonable profit." (No authority is cited in support of the latter conclusion).

In the Mackhank case the only proposition decided by this court was that there was substantial evidence reasonably supporting the conclusion that in order to prevent waste it was necessary to keep the two wells on production and the order was therefore not invalid. The Mackhank decision can in no way be construed as authority for a rule that would require allowable production sufficient to return the cost of the well and its operation plus a reasonable profit. The conservation statutes nowhere suggest such a factor. We find nothing in the law to justify that proposition.

In the Hawkins case the testimony was that Humble's properties contained 76.5 per cent of the recoverable reserves of the entire field and under the effective proration order it was allowed to produce only 71.4 per cent and this, if continued for the estimated life of the field, some 27 years, would result in drainage from the Humble's properties to the Townsite section of some thirty million barrels of Humble's oil. Some witnesses, on the other hand, testified that the productive life of the Townsite 73.74 acres would be shortened below that of the remainder of the field by some ten years on account of its position on the structure and the heavy withdrawals. Another witness testified that in his opinion if production were unrestricted the town lot wells would produce more oil than under the proration order then in effect. The court pointed out other considerations and factors which served to support the reasonableness of the Commission's order.

The Hawkins case goes further to state the accepted rule which is contradictory of any theory that the allowable must be fixed on a cost plus profit basis, namely, "In the exercise of this rule of curtailment it is generally recognized that the rules and regulations adopted must, as far as practical, and within reasonable limitations afford the several prop-

erty owners a fair opportunity to produce the recoverable oil underlying their lands or its equivalent." This rule had theretofore been firmly established in our jurisdiction.

In Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73 (1939), we held:

> "• • • It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S.W. 2d 1240, writ refused. • • •"

Again in Trapp v. Atlantic Refiining Co., Tex. Civ. App., 169 S.W. 2d 797, wr. ref., it is said:

> "• • • The uniform holding has been that the criterion implicit in this exception is whether the well is necessary to protect the owner in his right to obtain his fair share (or the equivalent thereof) of the recoverable oil underlying his land. Both of these exceptions were discussed and upheld in Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73. Since the issue raised in this contention has been so conclusively adjudicated, its discussion as an original proposition is both unnecessary and undesirable."

The Legislature announced a declaration of policy in the production and use of natural gas in § 1, Art. 6008 as follows:

> "In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production."

In Corzelius v. Harrell, 143 Tex. 508, 186 S.W. 2d 961, we quoted with approval the language used by the United States Supreme Court in Thompson v. Consolidated Gas Corporation, 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510:

> "* * * It may be assumed that House Bill 266 [Art. 6008] should be construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas to their justly proportionate shares thereof, free of drainage to neighboring lands. * * *"

In Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W. 2d 941, we held that "Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns; and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation."

As pointed out in Normanna we also held in the Marrs case that the allowables fixed for the two separate areas were entirely out of proportion to the potentials and would result in the taking of one man's property and giving it to another. Although the Marrs case rejected the substantial evidence rule, nevertheless that is not to say that the rules of law otherwise announced by that decision are wrong or have been overruled by later decisions of this court.

In the case presently before us the basic facts are not substantially in dispute. The contentions arise over conclusions to be drawn from those facts. From the testimony of Dillon's witness, the only witness offered by any of the appellees, it appears that a 1-acre tract under the $\frac{1}{3}$-$\frac{2}{3}$ formula would have a total gross income from April 1, 1960,

to the end of its productive period of $407,501.00. The total cost of such a well, including drilling, operating, and royalty expenses, would be $361,674.00, leaving a net profit of $45,827.00. The same testimony shows that under a formula based on acre feet of producing sand, each 1-acre tract even without prior production would have only a total gross income of $50,867.00. This witness further testified that the total hydrocarbon recovery from each 1-acre tract under the 1/3-2/3 formula would be 1,542,987 MCF of gas and 69,358 barrels of condensate. That of this total recovery, 1,432,987 MCF of gas and 62,858 barrels of condensate would be contributed by drainage. In other words, each 1-acre lot depends upon drainage for 92.87% of its gas recovery and 90.63% of its condensate recovery.

The witness further testified that the estimated field capability is 165,932,900 MCF of gas and 7,458,732 barrels of condensate; that the 22 small tract wells combined would recover 33,945,714 MCF of gas and 1,525,876 barrels of condensate. This witness estimates a total of 116,063 acre feet of producing sand in the Port Acres Field and he assigns 2,050 acre feet of this total or 1.77% to the 22 Rule 37 tracts. According to his figures, these small tracts with 1.77% of the producing sand would under the 1/3-2/3 formula recover 20.46% of the field's total gas and condensate potential.

Petitioner's exhibit from the Railroad Commission allowable schedule for September, 1960, shows 20 Rule 37 wells with a total allowable of 193,599 MCF of gas. Twenty-five wells on normal 160-acre proration units (some being less than 160 acres) are allowed to produce 1,116,416 MCF of gas. The tracts on which the 20 Rule 37 wells are situated comprise only 19.89 acres, while the 25 regular wells are located on 3,036 acres. Thus, on a productive acre basis, the 20 wells having .65% of the total acreage receive 14.6% of the allowable.

By way of comparison between the well on one of the largest producing units and the well on one of the smallest units, the following table is constructed from the testimony of the appellees' witness:

| Surface Acreage | | Monthly Allowable (MCF) | Average |
|---|---|---|---|
| Pan American-Ward | 176.00 | 48,587 | 276.06 MCF per acre |
| Thompson-Sassine | .25 | 9,515 | 38,060.00 MCF per acre |
| **Acre Feet of Sand** | | | |
| Pan American-Ward | 9,851.9 | 48,587 | 4.932 MCF per acre foot |
| Thompson-Sassine | 17.8 | 9,515 | 534.551 MCF per acre foot |

Thus, on the basis of the present proration order the well on the one-fourth acre tract is allowed to produce 137 times as much gas per acre as the well on 176 acres and 107 times more per acre foot of producing sand.

Article 6008, § 12, Vernon's Ann. Civ. Stat., provides that the Commission shall proceed to regulate and prorate gas production in the reservoir "on a reasonable basis". The Article further provides that "the monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste." Section 12 of that statute provides that the Commission shall take into account in fixing the daily allowable production for each gas well the size of the tract, the relation between the daily producing capacity and the aggregate daily capacity of all gas wells and all other factors which are pertinent.

The appellees offered some testimony that there is potentially a water drive from the east to the west that would result in longer and greater production in the western portion of the field where the Rule 37 wells are located, the theory being that this water drive would limit and flood out

the eastern wells forcing the gas westward into the higher structure where the Henderson Rule 37 wells are located, thus compensating Henderson at least in part for the drainage loss. On the other hand the appellants' witnesses emphatically assert that there is presently no water drive and deny that there is any indication of such occurrence in the future. We understand from the testimony that no water drive has yet occurred that has resulted in any loss to or flooding of the wells to the east where the drive would first be felt. Admittedly these Rule 37 wells are located in the area where the producing sand stratum is thicker and the structure is higher. In our opinion neither of these factors offer any comfort to the Rule 37 appellees because their tracts are almost completely surrounded by and lie within the confines of the Peter Henderson oil units and will necessarily drain from those units. There is testimony in the record that Halbouty and Meredith under the ⅓-⅔ formula will eventually produce substantially all of the gas estimated to underlie their land, but this fact does not tend to make the formula a reasonable one as between the Rule 37 wells and Henderson.

In making a comparison between the Peter Henderson units and the 20 Rule 37 wells[1] we use the testimony of appellees' witness. The Henderson units comprise 520.3 acres or 19.84% of the total field acreage and have 16.13% of the total field allowable while the 20 Rule 37 wells have a total of 19.88 acres or .76% of the total acreage and receive 14.78% of the total allowable.

From the testimony of the same witness it appears that Peter Henderson has 33,807 acre feet or 29.37% of the total acre feet in the field, while the 20 Rule 37 wells have only 1,957 or 1.70% of the total.

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[1] Only wells on October, 1960, Proration Schedule are used.

The appellees urge that this case is distinguishable from Normanna on the facts and therefore the latter should not control. (1) They say the Normanna Field had not been substantially developed, whereas the Port Acres Field is well developed. While this is true, that fact would appear to militate in favor of the appellants rather than of the appellees because the greater the development and the more accurate the obtainable geological information, the less justification can be found for applying the standard ½-⅔ proration formula. (2) They maintain that the allocation formula here is beneficial to some of the large tract producers and does not deprive them of any property rights. Although there is evidence that some of these producers, due to early production, or for other reasons, may recover 100% or more of their reserves in place, it is clear, however, that at least one of them, Henderson Oil Company, whose large units are composed of unitized small tracts, will suffer loss from drainage to the Rule 37 wells. (3) They say as contrasted with Normanna this is not solely a case of large tracts against small ones because Henderson makes the contention that the formula is inequitable as among the large tracts. We fail to see how this would make a material distinction, although the case here is principally one of small tracts that have been unitized against small tracts whose owners have preferred not to unitize. In Normanna we were concerned with only one small tract. Here 40 permits have been granted to drill small tracts of which there are 500 in the field, presenting a much more serious problem so far as orderly economical development is concerned.

Another point of distinction urged is that in Normanna the attack was made against the ½-⅔ formula while in this case the appellants asked the Commission to enter their "recommended order" in lieu of the ½-⅔ proration order. In other words they say that by the terms of appellants' ap-

plication the Commission was limited to an acceptance or rejection of the recommended order in that the appellants asked for no other relief than on a "take it or leave it" basis. They argue that there is a great difference procedurally between an application to enter a specific order and one claiming that the rule in effect is unduly harmful and requesting the Commission to rescind that rule and enter one that is fair and in its stead.

We do not so construe the proceedings in this case nor evidently did the Commission. Henderson's application reads: "On behalf of Peter Henderson Oil Company we wish to request a hearing to reconsider and amend Rule 3 of the special order adopting rules and regulations for the Port Acres [Lower Hackberry] Field of Jefferson County, Texas." At the time of filing of Henderson's application, November 19, 1958, only one permit to drill in this field as an exception to Rule 37 had been requested and it was not granted until December 22, 1958. The notice of the hearing issued by the Commission recited that the hearing would be held for the purpose of considering the application of Peter Henderson Oil Company and concluded as follows: "Pursuant to said Hearing the Commission will enter such rules, regulations, and orders as in its judgment the evidence presented may justify."

In Henderson's motion to the Commission for rehearing it is argued that the present formula is unjust and untair and does not allow to all parties a fair opportunity to have and produce their fair share of the gas and condensate from the reservoir. In that connection the motion urges the Commission to take into consideration the variation of the sand thickness, the size of the tracts, the drainage from the thick sand portion of the field into the thin sand and all other pertinent factors shown by the evidence to exist. It is also argued that if the per well factor is retained it should be substantially less than one-third.

The proceedings before the Railroad Commission are informal and their validity will not be tested by the technical rules of pleadings and practice that obtain in court trials. Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W. 2d 967; Cook Drilling Co. v. Gulf Oil Corporation, 139 Tex. 80, 161 S.W. 2d 1035.

The fact that appellants suggested and urged upon the Commission that the proration formula should limit recovery substantially to the reserves in place beneath each tract does not foreclose their right to complain of the formula which they considered inequitable and confiscatory of their property nor does it limit the Commission solely to the option of either accepting or rejecting the proposed formula in toto. All parties, of course, concede that the court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors. We are limited to passing upon the validity of the order as promulgated.

The appellees, in seeking to uphold the proration formula adopted by the Commission, discuss at considerable length the so-called "rule of capture" and claim some benefit or protection under that rule. They cite among other cases Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. 2d 935, 87 S.W. 2d 1069; Corzelius v. Harrell, 143 Tex. 509, 186 S.W. 2d 961; Ryan Consolidated Petroleum Corporation v. Pickens, 155 Tex. 221, 285 S.W. 2d 201. The doctrine of these cases is stated in Corzelius as follows:

> "The rule in this State recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein. It is also held that such rule should be considered in connection with the law of capture, which is recognized as a property right and both rules are subject to regulation under the police power of this State."

Somewhat more positively we said in Eliff v. Texon Drilling Company (1948), 146 Tex. 575, 210 S.W. 2d 558, 44 A.L.R. 2d 191,[2] that:

> "In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations."

In Ryan v. Pickens it is stated that "The courts of Texas have consistently held that the rule of capture is still in force in this State. It has become a vested property right." That is not to say, however, that the rule of capture is unlimited or not modified by the accompanying rule recognized by all the cases and stated in the Ryan case as follows:

> "* * * Here [in Texas] oil and gas in place are by the established rules of property a part of the realty or corpus of the land, and subject to ownership, severance, conveyance, lease and taxation as such. * * *."

The very fact that the Commission has the right to limit production on the basis of acreage is a recognition of that principle. If the Commission has the legal right, which they formerly exercised, to fix a proration formula based one-half per well and one-half on the amount of acreage, and as now generally practiced of basing the allowable 1/3 on the well and 2/3 on the acreage, then there is nothing in the rule of capture that would make it illegal for the

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[2] See also cases cited:

Lemar v. Garner, 121 Tex. 502, 50 S.W. 2d 769; Humphreys-Mexia Co. v. Gannon, 113 Tex. 247, 254 S.W. 296, 29 A.L.R. 607; Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W. 2d 27; Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, L.R.A. 1917F, 989.

Commission in the exercise of its sound judgment and discretion now to give greater or less weight to the well or acreage factors or for that matter to the amount of reserves in place of any other field factors as provided by the statute.

It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land.

As to the right of capture, appellees refer to the following statement in Brown v. Humble Oil & Refining Co., 126 Tex. 297, 83 S.W. 2d 935, 87 S.W. 2d 1096:

> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one's land by the exercise of the same right of capture. The following decisions discuss the law of capture as applied in this State: Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; H. & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 66 L.R.A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; Prairie Oil & Gas Co. v. State (Tex. Com. App.) 231 S.W. 1088, 1089. Both rules are subject to regulation under the police power of a state."

The court seems here to be merely stating what the rule of capture is if unlimited by correlative rights, for in the preceding paragraph the court expressly reaffirms that in Texas the law recognizes the ownership of oil and gas in place and gives to the lessee a determinable fee therein.

To infer that the rule of capture gives to the landowner the legally protected right to capture the oil and gas underlying his neighbor's tract is entirely inconsistent with the ownership theory. To harmonize both rules, the rule of capture can mean little more than that due to their fugitive nature, the hydrocarbons when captured belong to the owner of the well to which they flowed, irrespective of where they may have been in place originally, without liability to his neighbor for drainage. That is to say that since the gas in a continuous reservoir will flow to a point of low pressure the landowner is not restricted to the particular gas that may underlie his property originally but is the owner of all that which he may legally recover. This seems to be substantially the view expressed in Brown v. Humble, supra.

In Stephens v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566, it was determined that the rule of capture does not conflict with the view of absolute ownership of the minerals in place and we quote: "If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative rights to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own." In the Port Acres Field under the application of the existing proration formula Henderson does not enjoy any correlative rights so far as the small tract wells are concerned since there can be no compensatory drainage to Henderson from the small tracts.

In Normanna the evidence shows that the ⅓-⅔ formula would result in the drainage of a tremendous quantity of gas and condensate from other leases in the field to the 3-acre lease in question, though the precise amount of drainage was incapable of ascertainment, and of course such drainage could not be compensated by drainage from the

.3-acre tract to other leases in the field. The evidence further showed that the order would allow the well on the .3-acre tract to produce at a rate of over 200 times as much gas per acre as a well on the 320-acre unit established by the spacing pattern. We think the evidence here is comparable to that in Normanna. Under the order adopted in the Port Acres Field more than 90% of the hydrocarbons recovered by the Rule 37 wells would be drained from other leases in the field. As said in Normanna the proration formula adopted here of 1/3-2/3 does not come close to compelling ratable production nor afford to each producer in the field an opportunity to produce his fair share of gas from the reservoir.

We fully appreciate the thorny problem that the Commission has in this matter of proration among the hundreds of fields under their supervision with different characteristics and the diverse conflicting interests, views and opinions, but we are confident that with the trained personnel at their disposal a much nearer approximation can be made, giving to all parties an opportunity to produce a fair share of the minerals underlying the field with ratable allowables that will be more nearly equitable than appears in the case before us. As long ago as 1935 we said in the Brown v. Humble Oil & Refining Company case:

> "* * * It is now, however, recognized that when an oil field has has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions."

So far as the appellees' complaint that a striking down of the 1/3-2/3 formula would probably entail heavy financial

loss to them, it may be said that they drilled their wells at their own risk. There is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source. While the statute does not compel unitization, nevertheless it does expressly authorize that procedure subject to the approval of the Railroad Commission, Art. 6008b, V.A.C.S. It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying their properties and not for the purpose of enabling them to drain the minerals underlying adjoining lands to pay the cost of their operations plus profits. This does not mean and we are not to be understood as foreclosing the power of the Commission, by proper order or exception, to allow the holder of a Rule 37 permit to recover a sufficient amount of oil or gas to repay drilling and production costs and provide a reasonable profit when no other means of recovering the minerals which underlie his land are available. No such problem is before us.

From the foregoing it follows that the ⅓-⅔ proration formula as applied by the Commission in the Port Acres Field is invalid in that it does not afford an opportunity to all of the parties to produce and save their fair share of the minerals or their equivalent. We hold that it is not reasonably supported by substantial evidence.

The judgment of the trial court is reversed and judgment rendered for appellants.

Opinion delivered:

February 14, 1962

## STATEWIDE RULE 25 OF THE RAILROAD COMMISSION OF TEXAS

"RULE 25. PRODUCTION OF GAS TO BE RESTRAINED TO TWENTY-FIVE PER CENT OF POTENTIAL CAPACITY. — When the gas from any well is being used, the flow or production thereof shall be restrained to twenty-five per cent (25%) of the potential capacity of the same; that is to say, in any day (24 hours) the well shall not be permitted to flow or produce more than one-quarter of the potential capacity thereof as shown by the determination of potential provided for in Rule 24 hereof; provided, that this rule shall not apply to casinghead gas, and provided further, that in cases of emergency, greater production may be used after special authority therefor has been secured from the Railroad Commission of Texas. Applications for exceptions to this rule must be made to the Railroad Commission within thirty (30) days after effective date of this order. • • •"

RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION

OIL AND GAS DOCKET NO. 128
#3-48,488

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE PORT ACRES (LOWER HACKBERRY) FIELD, IN JEFFERSON COUNTY, TEXAS

Austin, Texas
May 24, 1962

NOTICE OF HEARING[3]

ON APPLICATION OF PETER HENDERSON OIL COMPANY & PAN AMERICAN PETROLEUM CORPORATION FOR ADOPTION OF A NEW ALLOCATION RULE FOR THE PORT ACRES (LOWER HACKBERRY) FIELD AND DETERMINATION OF THE PRODUCTIVE ACREAGE ASSIGNABLE TO WELLS IN THIS FIELD
JEFFERSON COUNTY, TEXAS

---

NOTICE IS HEREBY GIVEN To the public and all interested persons that the Railroad Commission of Texas will hold a Hearing at nine a.m., JUNE 18, 1962, in its Hearing Room in the Tribune Building, Austin, Texas, to consider the applications of Peter Henderson Oil Company and Pan American Petroleum Corporation for the adoption

[3] This notice of hearing was cancelled after the Commission was informed that the Texas Supreme Court had stayed the issuance of its mandate and execution and enforcement of its Judgment for a period of ninety days from May 23, 1962.

of a new allocation rule for the Port Acres (Lower Hackberry) Field, Jefferson County, Texas, to replace the rule invalidated by the Supreme Court of Texas in Michel T. Halbouty Et Al Versus the Railroad Commission of Texas Et Al; and for the further purpose of determining productive acreage and other matters related to the allocation of production to the several wells completed in this field.

PURSUANT To said Hearing, the Commission will enter such rules, regulations, and orders as in its judgment the evidence presented may justify.

RAILROAD COMMISSION
OF TEXAS

/s/ W. J. Murray, Jr.
*Chairman*

/s/ Ben Ramsey
*Commissioner*

/s/ Ernest O. Thompson
*Commissioner*

SEAL

ATTEST:

/s/ O. D. Henderson
*Secretary*

# RAILROAD COMMISSION OF TEXAS
## OIL AND GAS DIVISION

OIL AND GAS DOCKET NO. 129
#2-46,673

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE NORMANNA FIELDS, BEE COUNTY, TEXAS

Austin, Texas
September 27, 1961

## SPECIAL ORDER
## ADOPTING RULES AND REGULATIONS FOR THE NORMANNA FIELDS, BEE COUNTY, TEXAS

WHEREAS, Pursuant to the decision of the Supreme Court of Texas in Atlantic Refining Company vs Railroad Commission of Texas, 364 SW 2d 901 wherein the Special Field Rules adopted for the Normanna Fields in SO#2-36,482 as amended in SO #2-37,856 and SO#2-38,217 were ruled invalid, the Commission, after due notice to the public, all interested parties held a hearing on August 14, 1961, for the purpose of adopting special field rules to assure orderly development and production operation in such fields; and

WHEREAS, From its study of the mentioned decision, from the evidence, testimony, and argument adduced at said hearing, and from briefs filed by the interested parties, the Commission concludes it is recognized and understood by all parties that only Rule 3, the allocation rule, was subject to change, that the remaining rules were not questioned, but were considered reasonably necessary to proper regu-

lation of the field, and were acceptable in their present form; and

WHEREAS, The Supreme Court in holding such allocation formula invalid stated;

> "It does not come close to compelling ratable production; neither does it offer each producer in the field an opportunity to produce his fair share of the gas from the reservoir."

and then further stated;

> "The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property;" and

WHEREAS, From a study of the full record adduced at said hearing, which included technical reservoir data and legal briefs submitted by the several interested parties, the Commission is of the opinion and finds that an acreage allocation formula would reasonably provide each party an opportunity to produce its fair share of the gas in a reservoir, but because of the additional responsibility placed upon the Commission, that is, to arrive at a means of preventing confiscation of a small tract's reserves while allowing each operator to produce its fair share of the gas in a reservoir, as knotty a problem as has ever been placed before the Commission, must be solved, that such solution in all probability is best resolved through the use of a special allowable that would encourage a small tract owner to negotiate with his neighbors for fair and just treatment, but would also provide a sufficient allowable to such small tract to encourage a reasonable attitude in such neighbors so that they would endeavor to work out this common problem; and

WHEREAS, The Commission is of the opinion that Rule 3 as adopted herein, provides the impetus for such common endeavor, and as such, within reasonable limits, complies with the thoughts expressed in the Supreme Court decision.

NOW, THEREFORE, IT IS ORDERED By the Railroad Commission of Texas

• • •

IT IS FURTHER ORDERED By the Railroad Commission of Texas that effective October 1, 1961, the following rules in addition to such of the Commission's general rules and regulations as are not in conflict herewith be and the same are hereby adopted to govern the drilling, completion and operation of wells in the above-mentioned Normanna Fields, Bee County, Texas, as such fields are heretofore designated in this order.

RULE 1. • • •

The aforementioned distances in the above rule are minimum distances to allow an operator flexibility in locating a well, and the above spacing rule and the other rules to follow are for the purpose of permitting only one well to each three hundred twenty (320) acre proration unit.

• • •

RULE 2. The acreage assigned an individual non-associated gas well for the purpose of allocating allowable gas production thereto shall be known as a gas proration unit, and such acreage may be claimed for each non-associated gas reservoir independently of any other reservoir.

No gas proration unit shall contain more than three hundred twenty (320) acres except as hereinafter provided; • • •

RULE 3a. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production, after deductions have been made for wells which are incapable of producing their gas allowables, among the individual wells in the proportion that the acreage assigned such well for proration purposes bears to the summation of the acreage with respect to all proratable wells producing from the same reservoir.

RULE 3b. Any Operator having the right to drill a gas well upon a tract containing less than 100 acres, after application, notice and hearing prior to the drilling of the well, may, if in the judgment of the Commission the facts so justify, be given a definite and fixed special allowable, provided the well is completed as a producing well, higher than the allowable that would be fixed for any well completed upon such tract by reference to said allocation formula upon proof to the Commission (1) that the drilling and completion of a well upon said tract is not economically feasible; and (2) that each and every owner of the right to drill upon acreage immediately adjacent to said tract of less than 100 acres has refused to allow the pooling of said tract with enough of said immediately adjacent acreage to create a drilling unit of at least 100 acres upon fair and reasonable terms, that is, upon such terms as would allow the owners to drill, complete and operate the well to be drilled thereon and as would provide that all income received from 7/8ths of the production from said well and all expense of drilling, completing and operating said well should be shared among the owners of the working interest in said drillsite unit upon an acreage basis. Such special allowable shall control the production of gas from said well during its producing life, except that said allowable shall

be related properly to total field production as the same may fluctuate and said special allowable, if granted, shall in no event exceed the allowable of a gas well completed on a tract containing 100 productive acres; provided further however, that any well drilled before the adoption of this rule will be treated, for purposes of this rule, as though it had not yet been drilled.

RULE 4. • • •

RULE 5. • • •

IT IS FURTHER ORDERED That this cause be held open on the docket for such other and further orders as may be necessary.

RAILROAD COMMISSION
OF TEXAS

/s/ W. J. MURRAY, JR.
*Chairman*

.....
*Commissioner*

/s/ ERNEST O. THOMPSON
*Commissioner*

SEAL

ATTEST:

/s/ O. D. HENDERSON
*Secretary*

/pw

## EXCERPTS FROM CERTAIN STATUTES OF TEXAS

*Article 6008.*

"Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"• • •

"Sec. 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include:

"• • •

"(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, or operating well or wells as to reduce or tend to reduce the ultimate recovery of natural gas from any pool.

"• • •

"Sec. 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish the purposes of this Article, including rules, regulations, or orders for the following purposes:

"• • •

"(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

"• • •

"Sec. 8. It shall be the duty of all persons, companies or corporations producing natural gas from any gas well to ascertain and determine during the months of January, and July, respectively, of each year hereafter, through appropriate tests, to be made in the presence of and under the supervision of a representative of the Commission, and under uniform and generally recognized methods, and under regulations which shall be prescribed by the Commission, the open flow and rock pressure of each gas well from which natural gas shall be produced, and verified reports thereof shall be filed with the Commission on or before the tenth day of each of the months aforesaid; which said reports shall be kept on file with the Commission and shall become a permanent public record and shall be open to the inspection and examination of the public, and which said reports shall disclose the name of the representative of the Commission who was actually present when such tests were made. If any person producing gas from the same common reservoir be dissatisfied with the test as made and reported, such person may demand a second test to be made in the manner herein provided and in the presence of such person or his representative.

"• • •

"Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:

"(a) In the prevention of waste as 'waste' is defined herein;

"(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

"Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to pro-

duce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month. As amended acts 1947, 50th Leg., p. 1059, ch 453, § 1.

"Sec. 13. In determining the daily allowable production for each gas well the Commission shall take into account *the size of the tract* segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; *and all other factors which are pertinent;* provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located *in excess of the efficient drainage area of such well or wells, producing at twenty-five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission.* In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

" • • •

"Sec. 16. It shall be unlawful for any person to produce gas from a gas well in violation of the valid orders of the Railroad Commission of Texas. As amended Acts 1947, 50th Leg., p. 1059, ch. 453, § 3.

" • • •

"Sec. 20. In the event the Commission finds that the owner of any gas well has failed or refused to utilize or sell the allowable production from his well when such owner has been offered a connection or market for such gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reservoir or zone in which same is located until the owner thereof signifies to the Commission his desire to utilize or sell such gas. In all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas.

"• • • •

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law.

"• • •

"Sec. 24. Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority conferred by this Article, in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

"• • •"

*Article 6008a.*

"• • •

"Sec. 2. In any common reservoir in this State producing both sweet and sour gas, there shall never be produced from such common reservoir for utilization in carbon black manufacture, a maximum daily volume of sour gas from such gas wells in excess of seven hundred fifty million (750,000,000) cubic feet *which daily*

*volume of sour gas from gas wells shall be prorated by the Commission among all the sour gas wells in such reservoir so as to prevent cognizable and preventable drainage of gas from tracts of land in such sour gas producing area segregated as to surface position and common ownership on which such sour gas wells are located;* provided that if the daily demand for sour gas from gas wells for utilization in carbon black manufacture is less than the daily maximum allowable hereinabove permitted, the total daily volume of gas from gas wells from such sour gas area for utilization in carbon black manufacture shall be equal to such daily demand which demand shall be determined by the Commission and shall be prorated among all the sour gas wells in such area as hereinabove provided.

"• • •"

*Article 6014.*

"The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include:

"• • •

"(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

"(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership.

"• • •"

*Article 6015.*

"All operators, contractors, or drillers, pipe line companies, or gas distributing companies, drilling for or producing crude oil or natural gas or piping oil or gas for any purpose shall use every possible precaution in accordance with the most approved methods to stop and prevent waste of oil and gas or both, in drilling and producing operations, storage or in piping or distributing, and shall not wastefully utilize oil or gas, or allow same to leak or escape from natural reservoirs, wells, tanks, containers or pipes. Acts. 1919, p. 283."

*Article 6029.*

"The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

"(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

"• • •

"(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

"• • •"

*Article 6036a.*

"No rule, regulation or order shall be adopted by the Commission under the provisions of this Act or of Title 102 of the Revised Civil Statutes of Texas,

1925, as amended, dealing with the conservation of oil and gas and the prevention of the waste thereof, except after hearing upon at least ten (10) days notice given in the manner and form prescribed by the Commission; • • •."

*Article 6042.*

"Particular powers herein granted to the Commission shall not be construed to limit the general powers conferred by law, • • •."

*Article 6049c.*

"• • •

"Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. As amended Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2 § 8; Acts 1935, 44th Leg., p. 180, ch. 76, § 14.

"• • •"

"Sec. 11. • • • In the Court of Civil Appeals such court shall immediately and at as early a date as pos-

sible decide the questions involved therein; and in the event any question or questions shall be certified to the Supreme Court or writ of error thereto be requested or granted, it is here made the duty of the Supreme Court immediately to set down said cause for hearing and decide the cause at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character in such court."

*Article 6049d.*

"Sec. 4. Whenever the full production, from wells producing gas only, from any common source of supply of natural gas in this State is in excess of the reasonable market demand, the Railroad Commission shall inquire into the production and reasonable market demand therefor and shall determine the allowable production from such common source of supply, which shall be the reasonable market demand which can be produced without waste, and the Commission shall allocate, distribute or apportion the allowable production from such common source of supply among the various producers on a reasonable basis, and shall limit the production of each producer to the amount allocated or apportioned to such producer."

## TEXAS SUPREME COURT RULES:

### Rule 483. Order On Application For Writ Of Error

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the

notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of jurisdiction.'

"• • •"

**Rule 499-a. Direct Appeals**

"In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled 'An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency,' which act was passed by authority of an amendment known as Section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

"(a) In view of Section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of Sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

"(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State; when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

"(c) Such appeal shall be in lieu of an appeal to the Court of Civil Appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as

may be necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

"(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the Courts of Civil Appeals shall, in so far as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder. Promulgated by order of June 16, 1943, effective December 31, 1943."

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No. 341

In the

# Supreme Court of the United States

H. L. DILLON, JR., *et al.*, *Petitioners,*

*v.*

MICHEL T. HALBOUTY, *et al.*, *Respondents.*

*Petition for a Writ of Certiorari*
*to the*
*Supreme Court of Texas*

## BRIEF OF RESPONDENT, PAN AMERICAN PETROLEUM CORPORATION, IN OPPOSITION

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*Pan American Petroleum*
*Corporation.*

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No. 341

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In the

# Supreme Court of the United States

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H. L. DILLON, JR., *et al.*,

*Petitioners,*

*v.*

MICHEL T. HALBOUTY, *et al.*,

*Respondents.*

---

*Petition for a Writ of Certiorari*
*to the*
*Supreme Court of Texas*

---

## BRIEF OF RESPONDENT, PAN AMERICAN PETROLEUM CORPORATION, IN OPPOSITION

---

Pan American Petroleum Corporation is one of the Respondents in this case, the others being Michel T. Halbouty, Meredith & Company, and Peter Henderson Oil Company.

## FUNCTION AND JURISDICTION OF THE RAILROAD COMMISSION OF TEXAS IN THE ADMINISTRATION OF THE OIL AND GAS CONSERVATION LAWS.

## FUNCTION AND JURISDICTION OF THE TEXAS COURTS RELATIVE TO ORDERS ADOPTED BY THE RAILROAD COMMISSION OF TEXAS.

An understanding of the jurisdiction and power of the Railroad Commission of Texas and of the Texas courts in cases of this character will clarify the points to be considered by this Court.

Our oil and gas conservation laws in express terms constitute the Commission as the administrative agency charged with their enforcement. The Commission is charged with the duty and clothed with the power to make and enforce rules, regulations or orders for the conservation of oil and gas, and to prevent the waste thereof.[1]

Any interested party affected by the conservation laws relating to oil or gas, or by any rule, regulation or order of the Commission is authorized to file suit in the District Court of Travis County against the Commission to test the validity of such laws, rules, regulations or orders.[2]

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[1] *Title 102, Vernon's Civil Statutes of the State of Texas; Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S. W. 2d 935, 941, 99 A.L.R. 1107 (1935); Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. 2d 73, 81 (1939).*

[2] *Sec. 8 of Article 6049c, Texas Civil Statutes. Brown v. Humble Oil & Refining Co., supra at 83 S. W. 2d 939.*

In a suit to test the validity of an order of the Commission, the scope of judicial review of the facts is governed by the substantial evidence rule, meaning, evidence introduced in court. In other words, the order of the Commission will be sustained if supported by substantial evidence and will be cancelled if illegal, unreasonable or arbitrary.[3]

It is a question of law as to whether or not an order of the Commission is reasonably supported by substantial evidence.[4]

If an order of the Commission is found to be illegal or invalid by a court of competent jurisdiction, such court may so adjudge. The court cannot substitute a new order for the one adjudged invalid. That power rests exclusively with the Commission. This well established principle of law is reannounced by the Supreme Court of Texas in this case.[5]

## FAIR SHARE OF THE PRODUCTION.

In the case of *Gulf Land Co. v. Atlantic Refining Co.*, it is stated:

> "It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind."[6]

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[3] *Thomas v. Stanolind Oil & Gas Co., 145 Tex. 270, 198 S. W. 2d 420, 421 (1946); Trapp v. Shell Oil Co., 145 Tex. 323, 198 S. W. 2d 424, 436 (1946); Hawkins v. Texas Co., 146 Tex. 511, 209 S. W. 2d 338, 340 (1948).*

[4] *Railroad Commission v. Sterling Oil & Refining Co., 147 Tex. 547, 218 S. W. 2d 415, 417 (1949).*

[5] *Halbouty v. Railroad Commission, 357 S. W. 2d 364, 373 (1960); Brown v. Humble Oil & Refining Co., 126 Tex. 314, 87 S. W. 2d 1069, 1070 (1935).*

[6] *134 Tex. 59, 131 S. W. 2d 73, 80 (1939).*

Similar language has been used in a variety of conservation cases extending over a period of 27 years,[1] and similar language was used in this case.[2]

The opinion in this case demonstrates that the Supreme Court of Texas, in great detail, considered and analyzed the evidence in the light of the "fair share" rule. It should be emphasized that the court relied to a great extent on the evidence of the Petitioners and particularly their Exhibits 21 and 22. Their Exhibit 22 shows that during the expected life of a well on a one acre tract, under the ⅓-⅔ formula, it would produce hydrocarbons (gas and condensate) of a value of $407,501, whereas, their Exhibit 21 shows that the value of the recoverable hydrocarbons underlying a one acre tract is of a value of $50,867. It is immediately apparent that hydrocarbons of a value in excess of $350,000 would be

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[1] *Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S. W. 2d 935, 944, 99 A.L.R. 1107 (1935); Atlantic Oil Production Co. v. Railroad Commission, 85 S. W. 2d 655, 657 (W.E. Dis. 1935); Edgar v. Stanolind Oil & Gas Co., 90 S. W. 2d 656, 658 (Ref. 1936); Arkansas Fuel Oil Co. v. Reprimo Oil Co., 91 S. W. 2d 381, 383 (Ref. 1936); Magnolia Petroleum Co. v. Railroad Commission, 93 S. W. 2d 587, 588 (Ref. 1936); Magnolia Petroleum Co. v. Blankenship, 85 F. 2d 553, 555 (5 Cir. 1936); Railroad Comission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S. W. 2d 967, 971 (1937); Thompson v. Consolidated Gas Utilities Corporation, 300 U. S. 55, 57 S. Ct. 364, 371 (1937); Henderson v. Terrell, 24 F. Supp. 147, 150, 152 (1938); Railroad Commission v. Gulf Production Co., 134 Tex. 122, 132 S. W. 2d 254, 255 (1939); Dailey v. Railroad Commission, 133 S. W. 2d 219, 221 (Ref. 1939); Gulf Oil Corporation v. York, 134 S. W. 2d 502, 505 (1939); Ward Oil Corporation v. Overton Refining Co., 139 S. W. 2d 292, 293 (Ref. 1940); Gulf Oil Corporation v. Smith, 145 S. W. 2d 280, 283 (Ref. 1940); Wood v. Gulf Oil Corporation, 147 S. W. 2d 818, 820 (Dis. C.J. 1941); Marrs v. Railroad Commission, 142 Tex. 293, 177 S. W. 2d 941, 948 (1944); Corzelius v. Harrell, 179 S. W. 2d 419, 425 (1944); Corzelius v. Harrell, 143 Tex. 509, 186 S. W. 2d 961, 966, 968 (1945); Railroad Commission v. Humble Oil & Refining Co. (Hawkins Case), 193 S. W. 2d 824, 832 (N.R.E. 1946); Railroad Commission v. De Bardeleben, 157 Tex. 518, 305 S. W. 2d 141, 143 (1957); Halbouty v. Darsey, 326 S. W. 2d 528, 532 (N.R.E. 1959); Atlantic Refining Company v. Railroad Commission, Tex. , 346 S. W. 2d 801, 808 (1961); and Railroad Commission v. C. Murel Williams, Tex. , 356 S. W. 2d 131 (1961).*

[2] *357 S. W. 2d at page 370.*

drained from others. The unreasonableness of such a drilling program is further demonstrated by Petitioners' Exhibit 21, which shows that the cost of drilling, equipping and operating a well would be $361,674. The Supreme Court of Texas concluded that the drainage to the 22 Rule 37 wells is tremendous, results in the confiscation of Respondent's gas, and makes it impossible for Respondent to recover its "fair share" of the gas.

Practically all of the evidence was highly technical, as the witnesses were either geologists or petroleum engineers. The record consists of three volumes of verbal testimony, and six volumes of exhibits, including numerous maps, charts, tabulations and cross-sections.

*May it be emphasized in the strongest language possible that the basic issue in this lawsuit pertained to "fair share" of production.* The decision of the Supreme Court of Texas was reached after it had thoroughly analyzed and weighed in great detail the voluminous technical evidence.

## THE JUDGMENT OF THE SUPREME COURT OF TEXAS

Based on the above explanations, the judgment of the Supreme Court of Texas is very meaningful and a portion thereof reads as follows:

> "• • • it is considered, adjudged, ordered and decreed that Rule 3 of the 'Special Order Adopting Rules and Regulations for the Port Acres Field', No. 3-38395, entered by the Railroad Commission of Texas, was not

supported by substantial evidence and, therefore, is invalid and of no force and effect, * * *."[9]

## WEIGHING THE EVIDENCE

In order for this Court to make a decision in regard to the basic issue of "fair share", it would be necessary for the Court to make a detailed study of this voluminous, highly technical evidence. This Court is not expected to weigh the evidence in a case of this character.[10]

## NONFEDERAL QUESTION

It has been repeatedly stated by this Court that it will not review judgments of state courts that rest on adequate and independent state grounds.[11]

## PETITIONERS DRILLED THEIR WELLS AT THEIR OWN RISK

### (In Answer to Petitioners' Fourth Question)

After the discovery and completion of five wells in the Port Acres gas field, the Commission on August 18, 1958, adopted the ⅓-⅔ allocation formula. The trend of development was across an area consisting of more than 500 town-lots of less than one-half acre each. The interest of Respond-

[9]Page 88 of Petition for Writ of Certiorari.

[10]*Federal Trade Commission v. Standard Oil Co., 355 U. S. 396, 400, 78 S. Ct. 369, 371 (1957); Federal Trade Commission v. American Tobacco Co., 274 U. S. 543, 47 S. Ct. 663 (1927); United States v. Johnston, 268 U. S. 220, 45 S. Ct. 496, 497 (1925); Grayson v. Harris, 267 U. S. 352, 45 S. Ct. 317, 319 (1924).*

[11]*Fox Film Corporation v. Muller, 296 U. S. 207, 56 S. Ct. 183, 184 (1935); Flournoy v. Wiener, 321 U. S. 253, 64 S. Ct. 548, 552 (1944); Herb v. Pitcairn, 324 U. S. 117, 65 S. Ct. 459, 463 (1944); Cramp v. Board of Public Inst., 82 S. Ct. 275, 277 (1961).*

ent, Peter Henderson Oil Company, was primarily in the small tract area and it was successful in consolidating several hundred small tracts into drilling units in substantial compliance with the Commission's 160 acre unit rule. But there were a great number of small tracts which were not committed to any unit, and they presented a serious problem respecting the orderly development of the field. Henderson, on Novem'er 19, 1958, filed an application with the Commission requesting that the ⅓-⅔ allocation formula be amended. At a later date the other Respondents joined in this application.

It is appropriate to digress at this point to explain that the Commission has a well spacing Rule 37, which has been in force since 1919, and concerning which the appellate courts of Texas have written more than 300 opinions. Most oil and gas fields, including Port Acres, have a special spacing rule which is a variation of the statewide Rule 37. The Port Acres spacing rule provides for the location of wells 330 feet to any property, lease or subdivision line and 1320 feet to any other well. Obviously, a well could not be located on a one-half acre tract and comply with the spacing rule. But the rule permits the granting of exceptions to prevent waste or to prevent the confiscation of property. If an operator desires a well on a small tract, then a special procedure is required before the Commission consisting of (1) application, (2) notice, (3) hearing, and (4) the granting or denial of the drilling permit.

This explanation has been made about Rule 37 procedure in order to emphasize an important point in this case. At the

time the Henderson application was filed to amend the ⅓-⅔ allocation formula, one Rule 37 application was pending before the Commission. No Rule 37 application had been heard and, consequently, no permits had been granted. In other words, all of the Petitioners (small tract operators) in Port Acres pursued their Rule 37 applications, *obtained their permits, and drilled their wells after the Henderson application had been filed.*

These very pertinent undisputed facts explain the significant statement of the Supreme Court of Texas as follows:

> "So far as the appellees' complaint that a striking down of the ⅓-⅔ formula would probably entail heavy financial loss to them, it may be said that they drilled their wells at their own risk."[12]

*There is no escape from the proposition that the above constitutes the holding of the Supreme Court of Texas on the subject of financial loss to the small tract operators.*

The statement is made by Petitioners at pages 5 and 6 of their petition as follows:

> "The operational effect of the Texas Supreme Court's decision is that the Railroad Commission's proration rules, allocating allowables ⅓ per well—⅔ acreage for gas fields and ½ per well—½ acreage for oil fields, in many oil and gas fields in Texas, involving thousands of operators and investors, have been declared invalid, and that small tract owners' investment, running into millions of dollars, are subject to confiscation for the benefit of large tract operators, * * *."

This irresponsible statement, which is positively incorrect, was evidently made in an effort to alarm this Court.

[12] 357 S. W. 2d 376.

The Supreme Court of Texas, in one of its most recent decisions states in unmistakable language that *old* proration orders will not be disturbed.

> "We are in agreement with the reasoning of the courts in the Humble and Standard Oil Company cases in holding that where producers have acquiesced in and have failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain."[13]

## THE COMMISSION OR COURTS CANNOT ASSURE THE PETITIONERS A PROFIT

### (In Answer to Petitioners' Question No. 4

The Petitioners' fourth question presented for review is to the effect that Petitioners are entitled to "an allowable sufficient to give them a return on their investments."[14]

The Petitioners have cited as authority for the profit theory the case of *Railroad Commission v. Humble Oil & Refining Co.*, commonly referred to as the *Hawkins* case because it involved the Hawkins field.[15]

1. The portion of the opinion relied upon by the Petitioners is dictum.[16]

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[13] *Atlantic Refining Co. v. Railroad Commission, Tex. , 346 S. W. 2d 801, 811 (1961).* See also *Midas Oil Co. v. Stanolind Oil & Gas Co., 142 Tex. 417, 179 S. W. 2d 243 (1944).*

[14] Page 4 of the petition.

[15] *193 S. W. 2d 824 (Refused, No Reversible Error, 1946).*

[16] "From which it would seem that his allowable cannot be cut down to the point where his well would no longer produce, nor below the point where it could not be drilled and operated at a reasonable profit." *193 S. W. 2d at 832.*

2. The decision is by an intermediate appellate court, the Court of Civil Appeals. It is not the highest appellate court in Texas.

3. In the *Hawkins* case the Supreme Court of Texas "refused, no reversible error" the application for writ of error, thus meaning that it approved the judgment but not the opinion of the Court of Civil Appeals.[17]

4. The Supreme Court of Texas has expressly repudiated the profit theory in a very recent case.[18]

At Port Acres there are 500 separate and distinct tracts of less than one acre each. The recoverable reserves under a one acre tract, per the evidence of Petitioners, is of a value of $50,867, yet the mere cost of drilling a well is $275,000. Visualize the burden which would be placed on the Commission in trying to figure out how those 500 wells could make a profit. Such would be impossible, because gas in sufficient quantities does not exist at Port Acres. Is there any basis for favoring 22 tracts out of 500? If an allowable is granted the 22 wells which will insure a profit, then of necessity the other 478 tracts will be making a contribution toward the profit of the 22 tracts.

There is no authority in Texas, either legislative or court made, to the effect that the Commission has the power to allocate production for the deliberate purpose of making it possible for a small tract operator, large tract operator, or any other size operator to make a profit.

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[17] *Rule 483, Texas Rules of Civil Procedure; Texas Osage Coop Royalty Pool v. Clark, 159 Tex. 441, 322 S. W. 2d 506 (1959); D. C. Hall Transportation, Inc., Tex. , 358 S. W. 2d 117 (1962).*

[18] *Atlantic Refining Co. v. Railroad Commission, Tex. , 346 S. W. 2d at 810.*

## THE OFFER OF UNITIZATION TO THE PETITIONERS

### (In Answer to Questions Nos. 1, 2, and 3)

Following the quotation to the effect that the Petitioners drilled their wells at their own risk, the Supreme Court of Texas goes on to *comment* that:

> "There is some indication in the record by bill of exception that they offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source."[19]

The court further comments that Texas has a statute which, although not compulsory, authorizes unitization.[20] Respondent desires to make the following explanation about the comments of the Supreme Court of Texas respecting unitization:

1. The opinion is not based on the offer of unitization.

2. The *judgment* of the Supreme Court of Texas does not mention the subject of unitization as charged by the Petitioners at page 3 of their petition.[21]

3. The opinion does not state that the Commission has the authority to compel unitization.

4. The opinion does not go so far as to suggest to the Commission that unitization might be a solution to the small tract problem.

5. The opinion does not go so far as to recommend unitization as being feasible or desirable.

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[19] *357 S. W. 2d at 376.*

[20] *Article 6008b, Texas Civil Statutes.*

[21] See page 87 of the Petition for a copy of the judgment.

6. The opinion does not say that Petitioners should have accepted the offer to unitize or that the Commission should undertake directly, indirectly or otherwise to force the Petitioners to unitize.

7. In the Supreme Court of Texas the Petitioners made an extensive argument to the effect that separate development of their tracts was essential and necessary. The opinion simply answered that fallacious argument by pointing out that unitization was probably available to them as a means by which they could recover their fair share of the gas. Unitization is not an evil thing. Several hundred small tracts were combined into the Henderson units.

8. The right of separate development is not an issue in this case. No one will question the validity of the Rule 37 drilling permits issued by the Commission to the Petitioners. No one will question the right of the Petitioners to drill and produce their wells. *The issue in this suit pertains to the amount of gas produced from the wells of Petitioners.* The validity of Rule 37 drilling permit which involves the right of separate development is a separate and distinct cause of action. The validity of a Rule 37 permit is all that was involved in the case of *Halbouty v. Darsey, 326 S. W. 2d 528.* The Petitioners have repeatedly referred to that as "the companion case." It will be obvious to the Court that it is not a companion case.

9. Finally and of extreme importance, is the fact that the courts of Texas could have done nothing about unitization.

The district court or Supreme Court have no authority to rewrite any order with or without unitization. The fact of it is, the Commission refused to give consideration to the offer to unitize. *Therefore, the administrative process has not been exhausted.* Everyone connected with this lawsuit knows that this entire matter will go back to the Commission for another hearing, after which a new allocation formula will be written. The question of unitization can then be considered and it can be safely said that the Commission or Respondents or, finally, the courts, will make no attempt to force the Petitioners into a unit.

## THE MATTER IN CONTROVERSY HAS NOT REACHED THE POINT OF FINALITY

Although the judgment of the Supreme Court of Texas does not direct that the matter be referred back to the Commission, that is exactly the effect of the judgment. As has been pointed out, the district court or Supreme Court of Texas cannot write a new order and, consequently, they can do nothing about an (1) offer to unitize, (2) the fairness of an offer to unitize, or (3) whether unitization is to be forced on the Petitioners. The Commission, in the first instance and after another hearing, is the only tribunal authorized to rewrite the Port Acres allocation formula, and it is the only tribunal which can make the initial decisions about unitization.

It is obvious, therefore, that the judgment of the Supreme Court of Texas lacks that finality which will give this Court jurisdiction.[22]

WHEREFORE, Respondent, Pan American Petroleum Corporation, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FRANK J. SCURLOCK,

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[22] *Republic Natural Gas Co. v. State of Oklahoma*, 334 U. S. 62, 68 S. Ct. 972 (1948).

A copy of the foregoing brief in opposition was on this the 11 day of September, 1962, mailed to the following:

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IN THE

# Supreme Court of the United States

October Term, 1962

No. 341

H. L. DILLON, JR., ET AL., *Petitioners*

v.

MICHEL T. HALBOUTY, ET AL., *Respondents*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

## Brief of Respondents Michel T. Halbouty and Meredith & Company in Opposition

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IN THE

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October Term, 1962

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No._____

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H. L. DILLON, JR., ET AL., *Petitioners*

v.

MICHEL T. HALBOUTY, ET AL., *Respondents*

---

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

---

## Brief of Respondents Michel T. Halbouty and Meredith & Company in Opposition

---

Michel T. Halbouty and Meredith & Company, two of the Respondents in the above-entitled cause, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed herein by Petitioners.

### Opinions Below

The opinion of the Supreme Court in this case is correctly identified in the Petition and is copied in Appendix

"A" to the Petition. Likewise, the dissenting opinion of Associate Justice Smith on rehearing is correctly identified in the Petition and copied in Appendix "B" thereto. In addition, the Petition contains a copy of the opinion of the Court of Civil Appeals in the case of *Halbouty v. Darsey* (Appendix "C" of Petition), and contains a statement that the case of *Halbouty v. Darsey* is a "companion case". (Petition p. 2) Respondents deny that the present case and the case of *Halbouty v. Darsey* are "companion cases". Each was an entirely separate and distinct proceeding growing out of different facts and in fact involving different parties. Neither Respondents Henderson, nor Meredith & Company were parties to the case of *Halbouty v. Darsey*, and there was no jurisdictional or judicial connection between the two cases. *Halbouty v. Darsey* involved the validity of a Rule 37 permit issued by the Railroad Commission of Texas, and the instant case involves the ultimate determination of the validity of a proration order issued by the Railroad Commission of Texas.

## Jurisdiction

These Respondents submit that this Honorable Court has no jurisdiction to review the judgment of the Supreme Court of Texas in this cause, because that judgment in no way limits or restricts production from Petitioners' wells nor deprives them of any rights or property whatever. The only effect of the judgment was to declare invalid the 1/3-2/3 allocation formula adopted by the Railroad Commission of Texas, because it did not afford Respondents an opportunity to produce their fair share of the gas in the Port Acres Field reservoir. Unless the Railroad Commission of Texas has established a valid allocation formula to govern allowable production from wells

in a given field, Statewide Rule 25 becomes the applicable rule controlling allowable production from wells located in such field. Statewide Rule 25 permits wells to produce daily up to 25% of their open flow potential. It reads:

> "RULE 25. PRODUCTION OF GAS TO BE RESTRAINED TO TWENTY-FIVE PER CENT OF POTENTIAL CAPACITY.—When the gas from any well is being used, the flow or production thereof shall be restrained to twenty-five per cent (25%) of the potential capacity of the same; that is to say, in any day (24 hours) the well shall not be permitted to flow or produce more than one-quarter of the potential capacity thereof as shown by the determination of potential provided for in Rule 24 hereof; provided, that this rule shall not apply to casinghead gas, and provided further, that in cases of emergency, greater production may be used, after special authority therefor has been secured from the Railroad Commission of Texas. Applications for exceptions to this rule must be made to the Railroad Commission within thirty (30) days after effective date of this order. Where more than twenty-five per cent (25%) of the potential capacity is now being used, and thirty days from date will be given to secure permits for such special authority for exceptions to the rule."

The open flow potentials of all of Petitioners' wells are reflected in Plaintiffs' Exhibit No. 32 (S.F. page 308; Exhibit Vol. VI), and their allowables under the invalid 1/3-2/3 allocation formula are also shown in Plaintiffs' Exhibit 13 (S.F. page 18; Exhibit Vol. II). By a simple mathematical calculation it becomes obvious that Petitioners are in no way injured as a result of the 1/3-2/3 allocation formula having been invalidated by the judgment of the Texas Supreme Court. Rather, until such time as the Texas Railroad Commission enters a valid new

allocation order, Petitioners are freed from the restrictions imposed by the 1/3-2/3 formula, and are permitted to produce the increased amount provided by Rule 25.

Furthermore, this Court has laid to rest any question about its taking jurisdiction of disputes relating to the validity or invalidity of allocation formulas established by the Texas Railroad Commission pursuant to the applicable State statutes in the two *Rowan and Nichols Oil Company* cases. In the case of *Railroad Commission of Texas v. Rowan and Nichols Oil Company*, 310 U.S. 573, this Court said:

> "* * * What ought not to be done by the Federal courts when the due process clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state court is for the Texas courts to determine, and is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts."

Also, in *Railroad Commission of Texas v. Rowan and Nichols Oil Company*, 311 U.S. 578, it was held:

> "The court below also erred in holding the order a violation of the Texas statute requiring proration on a 'reasonable basis.' Vernon's Texas Annotated Civil Statutes, art. 6049c, Section 7. In denying the petition for rehearing in the earlier cases we held that whatever rights the state statutes may afford are to be pursued in the state courts."

The Supreme Court of Texas, in its opinion in this case, has held that the 1/3-2/3 allocation formula rule estab-

lished by the Texas Railroad Commission does not comply nor conform to the standards established by the Texas Legislature in Sections 12 and 13 of Article 6008, *Vernon's Annotated Texas Civil Statutes*. (Appendix "E" to Petition, pp. 77-78). In so holding, it has not in any sense of the word deprived Petitioners of their rights or their property in violation of the Constitution of the United States.

## Statement of the Case

These Respondents do not agree with the Statement of the Case as set out in the Petition. We do agree that the case involves the question of correlative rights between the operators of standard size proration units on the one hand and the Rule 37, or small tract operators on the other. The Texas Supreme Court did reverse and render the judgment of the trial court which had sustained the gas proration order of the Texas Railroad Commission. The only question presented to the Texas Supreme Court was whether or not that gas proration Order was valid. It held the Railroad Commission Order invalid because it was not supported by substantial evidence, but on the contrary was arbitrary, unreasonable and confiscatory of Respondents' property. (Appendix "A" to Petition, p. 32)

Petitioners would have this Court believe that the Texas Supreme Court based its holding on a bill of exception relating to offers which had been made to the small tract operators to pool their lands with properties belonging to the operators of the regular sized units. This, we submit, is an inaccurate appraisel of the opinion. A mere reading of the opinion of the Supreme Court of Texas discloses that the Court held that the allocation formula under attack was invalid because it did not afford Respondents (the plaintiffs in that case) an opportunity to produce

their "fair share of the gas to be produced from the reservoir" in accordance with Article 6008, Section 12, *Vernon's Annotated Texas Civil Statutes*, supra. This holding was based primarily on a consideration of the small tract operators' own evidence, which reflected that under the Order, more than 90% of the hydrocarbons recovered by the small tract wells would be drained from other leases in the field, and that such a formula did not come close to compelling ratable production nor afford to each producer in the field an opportunity to produce his fair share of the gas from the reservoir. (Appendix "A" to Petition, p. 46)

On August 18, 1958, the Railroad Commission issued its Special Order No. 3-38,395 prescribing field rules for the Port Acres Field, one of which rules was Rule 3 establishing an allocation formula distributing 1/3 of the total allowed gas production equally between all of the wells in the field and 2/3 of the total allowable gas production between the wells in the proportion that the surface acreage assigned to each such well bears to the total surface acreage in the reservoir. (Appendix "E" to Petition, p. 81) On November 21, 1958, before any town lot wells were drilled, Peter Henderson Oil Company filed an application with the Commission for an amendment of the allocation formula prescribed in Rule 3 of the Field Rules (S.F.; Plaintiffs' Exhibit 2, Exhibit Vol. II). The issues were thus joined at that time, but in spite of this fact, Petitioners began drilling their wells with the knowledge that an amendment of Rule 3 was being sought and continued to drill until at the time of the trial twenty-two town lot wells had been drilled in the Port Acres Field. (Appendix "A" to Petition, p. 31) After the hearing of the application, the Railroad Commission denied any relief to Respondents (Plaintiffs' Exhibit 8, Exhibit Vol. II) with the result that the 1/3—2/3

allocation formula continued to provide the basis for the allocation of gas production from the Port Acres Field. Respondents then filed suit in the District Court of Travis County to set aside the Order of the Railroad Commission establishing the 1/3-2/3 formula as well as the Order denying Respondents' application for an amendment to the formula. In spite of the fact that Petitioners' own evidence upon trial of this case showed that the 22 small tracts on which wells had been drilled in the Port Acres Field contained only 1.77% of the total field reserves, and that under the 1/3-2/3 allocation formula, those 22 small tract wells would recover 20.46% of the field's total gas and condensate reserves (Dillon Exhibits 17 and 21, Exhibit Vol. V), the trial court held that the Order of the Railroad Commission was supported by substantial evidence and entered judgment in favor of Petitioners. (Appendix "F" to Petition, p. 82)

Upon direct appeal of this case to the Texas Supreme Court, that court, basing its judgment largely on the evidence presented to the trial court by Petitioners, concluded that the order of the Railroad Commission was not supported by substantial evidence, but on the other hand was arbitrary, unreasonable and confiscatory as to Respondents, because it did not afford Respondents an opportunity to recover their fair share of the gas and condensate in the Port Acres reservoir as required by Section 12 of Article 6008, *Revised Civil Statutes of Texas*, supra.

## ARGUMENT

### I.

### The Decision Below Is Clearly Correct.

The Petition is based largely upon the lifting of one paragraph out of the exhaustive opinion written by the

Supreme Court of Texas in this case, the omission of which would have had absolutely no effect on the judgment of that Court. Despite the fact that before any of Petitioners drilled a well in the Port Acres Field, an application had been filed with the Railroad Commission to change the allocation formula that had been established for the field, and despite the further fact that an appeal from this denial was being vigorously prosecuted in the courts, Petitioners continued drilling wells in the face of the possibility that this allocation formula would be declared invalid. Alarmed by the decision of the Supreme Court of Texas in the case of *Atlantic Refining Company v. Railroad Commission*, —Tex.—, 346 S.W. 2d 801 (hereinafter referred to as "Normanna"), they argued in this case that if the 1/3-2/3 formula should be held invalid, they would suffer heavy financial loss because of the wells they had previously drilled. It was in passing reference to that contention that the paragraph made the basis of this Petition was placed in the opinion written by the Supreme Court of Texas.

It is true that during the hearing before the Railroad Commission of Texas offers were made to each of Petitioners to pool their tracts with large unit tracts in the Port Acres Field. Evidence of these offers was offered in the trial court and was excluded by that court except for the purpose of the bill of exception. Of course the Supreme Court became aware of this offer in studying the record of this case, but the mere fact that this offer to unitize appeared in the record by bill of exception and was alluded to by the Supreme Court in one paragraph of its opinion, is certainly no indication that the Supreme Court based its decision on a consideration of thos. offers. The mere fact that Petitioners drilled their wells at their own risk in the face of pending litigation and in the face of

offers to pool had no bearing whatsoever on the judgment of the Supreme Court that the Order complained of was invalid. That Order was invalid, as stated by the Supreme Court, because it permitted Petitioners to drain in excess of 90% of the production from their wells from lands belonging to Respondents and because it did not afford to Respondents an opportunity to produce a fair share of the gas and condensate from the reservoir.

## II.

### There Is No Federal Question Presented

(A) On Page 12 of the Petition, Petitioners contend that the Texas Supreme Court has denied the Petitioners due proces of law by refusing to remand the case for a new trial to permit them to present evidence on an issue considered by the Supreme Court to be material in determining the amount of production which the Railroad Commission of Texas could lawfully assign to Petitioners. With respect to this question, Respondents emphasize that *the only issue* in this case is the validity of the Order establishing the 1/3-2/3 formula in the Port Acres Field. All the Supreme Court of Texas has written in this case is related directly to that issue. Respondents submit that no issue relating to pooling or unitization was raised in the trial court nor in the Texas Supreme Court. If any town lot operator was denied an opportunity to pool or unitize, or was compelled to drill in order to produce the oil or gas underlying his property, the opinion of the Supreme Court of Texas fully protects his right so to prove *before the Railroad Commission* in connection with a new order to be issued by that Commission. The question of foreclosure of the power and authority of the Commission to grant

an exception in such an instance is carefully preserved by the Supreme Court with the Statement that "No such problem is before us.". The Railroad Commission is the initial fact finding agency, and its original jurisdiction to grant or deny exceptions or special allowables is exclusive. Only after the Railroad Commission has acted, and when its orders are being reviewed in appropriate proceedings, would testimony of the kind Petitioners want to offer become material. The prerogative of the Railroad Commission to issue other and valid orders after one of its orders has been held to be invalid was succinctly stated by the Supreme Court of Texas in the case of *Marrs v. Railroad Commission*, 142 Tex. 293, 177 S.W. 2d 941, as follows:

> "The orders heretofore entered will be held to be illegal; and, of course, the Commission will have to enter substantially different orders which will not arbitrarily discriminate between the parties and will not unlawfully deprive petitioners of their property. But within such limitations, the Commission will be left free to prescribe the terms of the orders to be entered by it."

Petitioners cite the case of *Saunders v. Shaw*, 244 U.S. 317, in support of their claim that the Texas Supreme Court has denied to them due process of law in violation of the Fourteenth Amendment to the United States Constitution. Respondents submit that the *Shaw* case offers no comfort to Petitioners. In that case the State Supreme Court, basing its judgment on the very evidence that had been held inadmissible in the trial court, reversed the judgment of the trial court and granted an injunction. Respondents submit that there is no similarity between the

*Shaw* case and this case. The Texas Supreme Court did not, in its judgment or in its opinion, pass upon the admissibility nor deem material the offers to unitize which were held inadmissible by the trial court. Whether or not offers to unitize had been made to Petitioners would not have made the allocation formula fair and reasonable as to Respondents. That Order denied to Respondents the right to produce their fair share of the gas and condensate in the Port Acres Field and the passing reference by the Supreme Court to the fact that the investments of Petitioners in their wells would have been avoided and they could have recovered a fair share of the minerals produced from the common source had they accepted certain offers of unitization does not change that crucial issue.

(B) At pages 14 and 19 of the Petition, Petitioners contend in effect that the judgment of the Texas Supreme Court requires the Railroad Commission of Texas, as a matter of law, to place stringent limitations upon the production by Petitioners of gas from wells on their leases, depending on whether or not they were offered unitization that would prevent confiscation and afford them a fair share of the mineral proceeds from the common source, but that the Texas Supreme Court does not point out any statutory procedure or reasonably definite or ascertainable standard by which the Railroad Commission may be guided. In making these contentions, Petitioners miss the real issue in this case and ignore certain vital statements contained in the opinion of the Supreme Court of Texas. As pointed out above, until such time as the Railroad Commission issues a new order relating to the allocation of production from the Port Acres Field, the Petitioners have been released from the fieldwide allocation formula

and are free to produce their wells under Statewide Rule 25. That is the effect of the judgment of the Texas Supreme Court on Petitioners. Whatever limitation, if any, were to be placed by the Railroad Commission on the production of Petitioners' wells was very clearly reserved to the Railroad Commission by the Texas Supreme Court in its opinion:

> "We fully appreciate the thorny problem that the Commission has in this matter of proration among the hundreds of fields under their supervision with different characteristics and the diverse conflicting interests, views and opinions but we are confident that with the trained personnel at their disposal a much nearer approximation can be made, giving to all parties an opportunity to produce a fair share of the minerals underlying the field with ratable allowables that will be more nearly equitable than appears in the case before us. As long ago as 1935 we said in the Brown v. Humble Oil & Refining Company case:
>
> > "* * * It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions.'"

Previously, the Supreme Court of Texas had reserved the rule making power to the Railroad Commission in the case of *Corzelius v. Harrell*, 143 Tex. 508, 186 S.W. 2d 961, at Page 967, as follows:

> "The Railroad Commission is not required in administering the oil and gas statutes to be absoluetly

accurate in its rules and orders. This would be impossible. It is the duty of the Commission to treat all interested parties justly and impartially, and the actions and rulings of the Commission in attempting to accomplish such results will not be disturbed by the courts unless such rules or orders are clearly illegal, unreasonable or arbitrary. *The power to make rules rests exclusively with the Railroad Commission. Courts may adjudge that a rule of the Commission is invalid, but they can not substitute a new rule for the one adjudged invalid. Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S.W. 2d 935, 87 S.W. 2d 1069, 99 A.L.R. 1107; 1D, 126 Tex. 296, 87 S.W. 2d 1069, 101 A.L.R. 1393; *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S.W. 2d 73; *Magnolia Petroleum Co. v. Railroad Commission*, 128 Tex. 189, 96 S.W. 2d 273; *Magnolia Petroleum Co. v. New Process Production Co.*, 129 Tex. 617, 104 S.W. 2d 1106; *Railroad Commission v. Wencker*, 140 Tex. 527, 168 S.W. 2d 625." (Emphasis supplied)

The Supreme Court of Texas has not held in this case that in making valid rules and regulations governing allowable production from the Port Acres Field the Railroad Commission must take into consideration offers to pool or unitize. The only standards referred to by the Court were those which had been established by the Legislature of the State of Texas and which had previously been construed by that court. The Court defined the rights of the owners of oil and gas properties in Texas and generally referred to the standards by which the Railroad Commission should protect those rights as follows:

"In Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W. 2d 941, we held that 'Under the settled law of this State oil and gas form a part and parcel

> of the land wherein they tarry and belong to the owner of such land or his assigns; and such owner has the right to mine such minerals subject to the conservations laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.'
>
> "As pointed out in Normanna we also held in the Marrs case that the allowables fixed for the two separate areas were entirely out of proportion to the potentials and would result in the taking of one man's property and giving it to another. Although the Marrs case rejected the substantial evidence rule, nevertheless that is not to say that the rules of law otherwise announced by that decision are wrong or have been overruled by later decisions of this court."

The rights enunciated in the above-quoted paragraph from the opinion of the Supreme Court of Texas were not qualified by that court as being dependent upon offers to pool or unitize. Neither was the Railroad Commission enjoined to consider such offers in connection with its exclusive rule making power.

(C) At page 20 of the Petition, in Paragraph 4, Petitioners advance a proposition that Respondents submit is entirely novel, and which has not heretofore been recognized in the regulation by the State of Texas (or any other state) of the oil and gas industry. That proposition, briefly stated, is that a permit to drill an oil and gas well is akin to a public utility franchise, and, when granted, the Railroad Commission must grant a production allowable that will afford to the holder of the permit a return on his investment that will enable him to recover his drilling cost, operating expenses, and a reasonable profit.

Certainly the oil and gas industry would be pleased with a guaranteed rate of return on its investment; but this is not the law and the cases cited by Petitioners do not so hold. The first case cited by Petitioners, *Halbouty v. Darsey*, 326 S.W. 2d 528 (Tex. Civ. App., writ ref'd, n.r.e.), has the following to say as to Rule 37 permits:

> "Exceptions to the rule, granted to protect vested rights, for which the rule expressly provides presuppose some resultant waste, or other detriment. The inherent right of the landowner to obtain his fair share of the oil in place under his land is the basic consideration for the exception to the rule 'to protect vested rights,' which is deemed to outweigh other considerations for which the rule was promulgated. *The commission has ample power to pass such rules or orders as may be necessary to minimize the deleterious effects flowing from exceptions to the rule.*" (Emphasis supplied)

The case of *Humble Oil & Refining Company v. Railroad Commission*, 94 S.W. 2d 1197 (Tex. Civ. App., writ of err. ref'd) also fails to support Petitioners' position. That case merely held that in determining whether a segregated tract was entitled to a permit to drill a well as an exception to Rule 37 of the Rules of the Railroad Commission of Texas, the Rule, as it existed at the time of the segregation, should be controlling and not a subsequent amendment to that Rule. The case made no attempt to draw a parallel between franchises granted to public utilities and permits to drill oil and gas wells under regulations of the Railroad Commission of Texas. The case of *Humble Oil & Refining Company v. C. C. Cook, et al.*, 215 S.W. 2d 383 (Tex. Civ. App., writ ref'd, n.r.e.) likewise drew no analogy between well drilling permits and franchises

granted to public utility companies. That case did state that a "permit carries with it the right, in the event of production, *to operate the well and to produce the oil or gas under the rules and regulations of the Railroad Commission.*" (Emphasis supplied) Petitioners imply that the operator of a well drilled under a Rule 37 permit acquires a vested right to produce the same amount of oil or gas during the life of such well as was fixed by the proration schedule in force at the time he drilled such well. The reverse of this is true and was held in Texas in the case of *Chenoweth v. Railroad Commission*, 184 S.W. 2d 711 (err. ref'd). In that case the court held:

> "* * * It is settled law that when an owner or operator invests his money and drills a well in keeping with an existing valid order of the Commission he acquires property rights which he is entitled to have protected. The most common instance in such cases is where an owner has drilled his tract to a density authorized by the old oil spacing provisions of 150-300 feet. Change of the spacings to 330-660 feet cannot operate to destroy his property rights legally acquired in the wells already drilled under the former spacing provisions. *But such owner or operator acquires no vested right to continue to produce the same amount of oil or gas during the life of such well as was fixed by the proration schedule in force at the time he drilled such well.*" (Emphasis supplied)

The other cases cited by Petitioners under this proposition are strictly public utility cases involving railroads, electric companies and other public utilities which are, of course, affected with a public interest. Respondents submit that these cases have no application to this case and are in no way analogous.

## Conclusion

At page 22 of the Petition, Petitioners admit that the decision of the majority of the Texas Supreme Court is final on matters within the State's exclusive control and jurisdiction and that this court will not concern itself with the correctness of the construction of Texas statutes by the Texas Supreme Court. Respondents respectfully submit that this case falls precisely within the boundaries of that admission. The interjection of mere possibilities as to the type of rule which will be entered by the Railroad Commission of Texas on further hearing cannot convert a correct decision into an important question of federal law warranting review by this court on certiorari.

WHEREFORE, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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SUBSCRIBED AND SWORN to before me on this the 15 day of September, A.D., 1962.

Notary Public in and for
Harris County, Texas

FEROL ROGERS
Notary Public, in and for Harris County, Texas

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NO. 341

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

H. L. DILLON, JR. ET AL., *Petitioners*

v.

MICHEL T. HALBOUTY, ET AL., *Respondents*

## REPLY BRIEF FOR PETITIONERS

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NO. 341

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H. L. DILLON, JR. ET AL., *Petitioners*

v.

MICHEL T. HALBOUTY, ET AL., *Respondents*

## REPLY BRIEF FOR PETITIONERS

*To The Honorable Supreme Court of the United States:*

Petitioners, H. L. Dillon, Jr., et al., respectfully submit this reply to the several briefs of the respondents.

1. *The federal constitutional questions were timely raised in the motion for rehearing in the Texas Supreme Court, since they all arose from the decision of that Court. Petitioners' claims of violations of their rights under the Fourteenth Amendment were considered and overruled by the Texas Supreme Court.*

The decision of the Texas trial court was favorable to petitioners. On the point of offers to unitize petitioners' leases, the trial court sustained petitioners in their contention that evidence of such offers was immaterial. The Texas Supreme Court was the first court in which a de-

cision adverse to petitioners was rendered. On the issue of unitization, the ruling was contrary to earlier Texas holdings. It was therefore timely for petitioners to raise the federal constitutional issues in a motion for rehearing in the Texas Supreme Court; *Saunders v. Shaw*, 244 U.S. 317; *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313; *Granniss v. Ordean*, 234 U.S. 385; *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, the decision of the Texas Supreme Court having supplied "a new and unexpected basis for a claim by the defeated party of the denial of a federal right." See *Great Northern Railway Company v. Sunburst Oil & Refining Co.*, supra, at 367.

Cases cited by respondents on this point are all distinguishable on the ground that in those cases (as contrasted with this case) there had been "ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment." See, for example, *American Surety Company v. Baldwin*, 287 U.S. 156, 164, where this distinction is made.

The Texas Supreme Court expressly granted leave to petitioners to amend their motion for rehearing, and said motion, as amended to include the federal constitutional issues here asserted (Appendix "D", petition for certiorari, 73-75) was considered and overruled. (See Appendix "H", petition for certiorari, 89.)

2. *The absence of the Railroad Commission as a petitioner in this Court.*

The Railroad Commission of Texas is an administrative agency of the state and obviously has no property rights

in the gas in the Port Acres Field. The Railroad Commission therefore could not assert any deprivation of property in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. *Stewart v. Kansas City*, 239 U.S. 14; *Smith v. Indiana*, 191 U.S. 138; *Braxton County Court v. West Virginia*, 208 U.S. 192.

As appears from the record in the Texas trial court and the Texas Supreme Court, the Railroad Commission vigorously defended the validity of its order as being in conformity with prior decisions of the Texas Supreme Court. The failure of the Railroad Commission to join in the petition for certiorari is nothing more than a recognition of the law which prevents the Commission from asserting the constitutional issues raised by petitioners.

Petitioners, whose huge investments are directly involved in the outcome of this case, cannot be denied their constitutional rights because of the Commission's legal inability to assert any such rights under the Fourteenth Amendment.

While it is true that the Texas statute providing for appeals from orders of the Railroad Commission, Article 6049c, Section 8, *Vernon's Texas Civil Statutes* (see Henderson Brief, Appendix, 38a), permits the bringing of a suit against the Railroad Commission as the only defendant, any person who will be adversely affected by a judgment cancelling the Railroad Commission's order has a right to intervene to protect his property rights, as the petitioners did without objection in this case. Such interventions are standard practice in such cases, if the real parties in in-

terest are not originally made defendants in the suit to cancel the Commission's order. No question was or could be raised in this case about petitioners' vital interest in the allocation of the gas production as between themselves and the respondents.[1] Petitioners clearly have property rights entitled to protection under the Fourteenth Amendment. The inability of the Railroad Company to assert any such property rights cannot prejudice petitioners' right to raise and urge the constitutional issues her involved. All of the respondents except Peter Henderson Oil Company tacitly recognize that this is true. Henderson cites no authority to sustain its apparent contention that the absence of the Railroad Commission as a petitioner adversely affects petitioners' right to claim protection under the Fourteenth Amendment to the United States Constitution, for the obvious reason that there could be no authority for any such contention.

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[1] See, for example, Pan American Brief, 12:

"No one will question the validity of the Rule 37 drilling permits issued by the Commission to the Petitioners. No one will question the right of Petitioners to drill and produce their wells. **The issue in this case pertains to the amount of gas produced from the wells of Petitioners.**" (Emphasis by Pan American)

See also Halbouty Brief, 5:

"We do agree that the case involves the question of the correlative rights between the operators of standard size proration units on the one hand and the Rule 37, or small tract operators on the other."

Henderson in its brief (footnote, 21) quotes from the opinion of the Texas Supreme Court that "the case is principally one of small tracts that have unitized against small tracts who have preferred not to unitize."

3. *The purpose and effect of the respondents' suit was to secure a judgment which would compel the Railroad Commission to change the allocation formula so as to make it impossible for petitioners to produce enough gas to pay back the cost of drilling and operating their wells. The judgment of the Texas Supreme Court, sustaining respondents' contentions, will mean heavy financial loss to petitioners.*

It is cruel mockery for respondents to argue that "no loss can possibly result to petitioners from the invalidation of the present gas proration order." (Henderson Brief, 6. See also Halbouty Brief, 2-3) Even the opinion of the Texas Supreme Court at least tacitly recognizes that its judgment will "probably entail heavy financial loss" to petitioners. (Appendix "A", petition for certiorari, 47; 357 S.W. 2d at 376) The extent of such loss is indicated by the facts recited in the opinion of the Texas Supreme Court, showing that while the drilling and operating expenses for each of petitioners' wells would be about $361,675.00, the value of the gas produced under a formula based on acre feet of producing sand would be only a gross amount of about $50,867.00. (Appendix "A", petition for certiorari, 36-37; 357 S.W. 2d at 371) It takes only a simple arithmetical calculation to show that the total loss to petitioners, considering only drilling and operating costs for their wells, would approximate $6,000,000.00.

The purpose of respondents' suit is to invalidate the order of the Railroad Commission which would permit petitioners to produce enough gas at least to justify the drilling and operating costs of the wells which petitioners have drilled upon their separate small tracts. As respondents Halbouty, et al., say in their brief (page 10), quoting from

*Marrs v. Railroad Commission*, 142 Tex. 293, 177 S.W. 2d 941, 950 (1944), the effect of the judgment of the Texas Supreme Court cancelling the proration order of the Railroad Commission will be that "of course the Commission will have to enter substantially different orders." The decision of the Texas Supreme Court unequivocally denies to petitioners the right to an allowable which would "pay the cost of their operations plus profits" and limits them to recovery of "the minerals underlying their properties." (Appendix "A", petition for certiorari, 47; 357 S.W. 2d at 376) While the Texas Supreme Court cannot itself draft an allocation formula, it has adjudicated the legal rights of the interested parties and has settled the law which the Railroad Commission must apply in promulgating the "substantially different" order which it must enter in obedience to the Texas Supreme Court's judgment.

As petitioners stated in their original brief in the Texas Supreme Court (quoted, Henderson Brief in this Court, 6-7), and as we now re-emphasize, the object of respondents' suit is to gain a judgment from the Texas courts which will require the Railroad Commission to adopt an allocation formula on the basis which respondents urge, "substantially in proportion to gas reserves in place." A reading of the opinion of the Texas Supreme Court shows that that Court held that the Railroad Commission is under the legal duty to enter and enforce such an order. The respondents would certainly not be so vigorously defending the Texas Supreme Court's judgment if they did not believe that they had won their case and that to comply with the Texas Supreme Court's judgment the Railroad Commission must enter an order which radically reduces the petitioners' allowable production.

The Texas Supreme Court in its opinion says that the striking down of the Commission's proration order will "enjoin upon the Railroad Commission the duty to write a new order." (Appendix, "A", petition for certiorari, 27; 357 S.W. 2d at 366-367) The opinion as a whole sustains the "hope" of Peter Henderson Oil Company that an order will "soon be entered" radically cutting the allowable production of petitioners' wells by "prorating the production of gas in the Port Acres Field on a reserve or some other reasonable basis and requiring all producers to comply therewith." (Henderson Brief, 16-17)

The decision of the Texas Supreme Court in this case adjudicated legal rights of the competing producers in the Port Acres Field and established the basis on which the Railroad Commission will be required to allocate production in the future. The decision therefore is not merely an interim adjudication in an uncompleted administrative process, but the judgment has the finality which is necessary to the jurisdiction of this Court. *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*, 336 U.S. 18.

It is true that in the absence of any special field rules, Statewide Rule 25 would apply, and that under this rule petitioners' wells would be allowed to produce more than under the 1/3 per well-2/3 acreage formula which has been cancelled by the Texas Supreme Court. Such a situation, however, could exist only for a brief interval until the Railroad Commission, complying with the decision of the Texas Supreme Court, enters some proration order which will restrict petitioners substantially to the production of the equivalent of the gas in place beneath their tracts. Any production by petitioners under Statewide Rule 25 would be infinitesimal compared to the loss that peti-

tioners will ultimately sustain as a result of the Texas Supreme Court's judgment.

4. *The opinion of the Supreme Court of Texas shows that that Court held that petitioners cannot complain of the huge financial loss that will result to them from the cancellation of the 1/3 - 2/3 allocation formula because the Court finds that petitioners were offered unitization which would afford them a fair share of the mineral proceeds from the common source. This holding was not dictum, as respondents contend.*

In our petition for certiorari (pages 9-10), we quoted in full the concluding three paragraphs of the majority opinion of the Texas Supreme Court. Respondents insist that what the Texas Supreme Court said about an offer of unitization is dictum, and in effect respondents urge that this part of the Court's opinion must be ignored.

The first answer to respondents' contentions is that they refuse to take into account the plain words of the Texas Supreme Court's opinion. The Court is answering the petitioners' complaint that the striking down of the 1/3-2/3 formula will entail "heavy financial loss" to petitioners. The Court's answer is that petitioners drilled their wells "at their own risk." Why? The reason the Court gives immediately follows. It is that "there is some indication in the record by bill of exception that they were offered unitization that would prevent confiscation and afford to them a fair share of the mineral proceeds from the common source."

The Court says nothing about any other reason why petitioners are held to have acted "at their own risk." On

the contrary, the Court goes ahead to discuss unitization, as a permissible procedure. It concludes this paragraph by saying that in cases where the holder of a permit to drill on a small tract has no other means of recovering minerals which underlie his land, the Commission may "by proper order or exception" allow him to recover a sufficient amount of gas to repay drilling and production costs and provide a reasonable profit. The Court, however, says that "no such problem is before us," plainly referring to the bill of exception indicating that petitioners were offered unitization. The Court does not here, or elsewhere in its opinion, give as the reason why petitioners drilled their wells "at their own risk" that this drilling was done pendente lite.

The holding of the Texas Supreme Court, that petitioners were not entitled to complain of the huge financial loss which they will suffer, because they were offered unitization, was certainly not an inadvertent dictum of the Texas Supreme Court. *On the contrary, it was a holding which was urged upon that Court by the respondents.*

The evidence of offers of unitization was offered in the trial court by the respondents, Halbouty, et al., upon the following ground. (S.F., 638).

> "We have requested equitable relief; this is offered, frankly, to put ourselves into equitable position and to meet the contention which will be made, I am sure, that had the allocation formula we are advocating been adopted, these people would have been left high and dry; and I want to be able to show that they had available to them a ready means of being able to realize on their holdings precisely the same as all of their neighbors. That is the whole purpose of it."

Respondent Henderson also urged upon the trial court the admissibility of offers of unitization: (S.F., 644)

> "We think the offers are highly material in the consideration of the allocation of the production."

Petitioners, on the other hand, took the position, both before the Railroad Commission and in the District Court, that evidence of offers to unitize were immaterial because as a matter of law (as decided in all Texas cases up that time) petitioners had the right to develop their small tracts separately and to receive a living allowable for the wells that they lawfully drilled, regardless of any offers by other operators to unitize petitioners' tracts with other tracts. It was inconceivable to petitioners, as it was to the Railroad Commission and the District Court, that the legal right of separate development could be effectually destroyed by so limiting the gas which could be produced from wells lawfully drilled on small tracts that the production could pay for no more than a small fraction of the cost of drilling and producing the wells, if an offer to unitize had been made by adjoining owners. The right of separate development had been regarded as settled. *Halbouty v. Darsey*, 326 S.W. 2d 528 (writ refused, n.r.e.) (Appendix to petition for certiorari, 64-73). Therefore, the District Court refused to admit in evidence the respondents' offers to unitize.

In its original brief in the Texas Supreme Court (page 18), Henderson urged that evidence of its offer to pool its leases with numerous small tracts was highly material in determining the validity of the proration order: (Henderson Original Brief, Texas Supreme Court, 20.)

> "In this case the evidence tendered is highly material as to the effect of prorating the Field on a reserve or acre foot basis as requested by Plaintiffs and Henderson, and to show that the Plaintiffs and Henderson proposed to give the small tract operators a reasonable and fair opportunity to participate in the field's production in proportion to their ownership."

In Henderson's Reply to Appellees' Briefs in the Texas Supreme Court (page 30), Henderson concluded its argument on this point in the following language:

> "Appellees complain that to strike down the order in suit will lead to some future order which will make it so unprofitable to drill the small tracts that no such drilling would be done and a small tract operator's reserves would be lost by drainage to regular unit wells. The tendered evidence was in proof of the fact that that result would not have occurred in the instant case, and it need not occur in any future case. *We respectfully submit that such proof is relevant, is without dispute, and should be fully taken into account by this Court in its opinion and judgment in this case.*" (Emphasis added)

A comparison of the language just quoted from Henderson's brief with the language in the opinion of the Texas Supreme Court in the paragraph relating to offers of unitization (357 S.W. 2d at 376, quoted in petition for certiorari, 9-10) shows beyond any reasonable doubt that the Texas Supreme Court did exactly what Henderson urged. The Court took into account in its opinion and judgment the record (as shown in a bill of exception) of offers of unitization and held that because of such offers petitioners could not complain of the loss of the investments which they had made after refusing to accept such offers of unitization.

*5. The opinion and judgment of the Texas Supreme Court deny to petitioners the right to controvert respondents' evidence as to offers of unitization.*

We recognize that this Court is not concerned with whether the Texas property law, relating to the rights of the owners of wells lawfully drilled on small tracts, was changed retroactively by the decision of the Texas Supreme Court in this case. However, we respectfully submit, this Court *is* concerned with petitioners' right to a fair hearing upon the issues which the Texas Supreme Court now holds to be material in determining whether petitioners are entitled to a living allowable for their wells. If offers of unitization are material in determining petitioners' right to produce enough gas to pay back their costs, with possibly a reasonable profit, then at least petitioners should be afforded a fair opportunity to offer their controverting evidence as to whether they did in fact receive any valid and fair offers to unitize their small tracts with respondents' tracts and why unitization was not effected. Having ruled, reversing the trial court, that offers to unitize are material, the Supreme Court of Texas should at least have given petitioners an opportunity to present their side of the case on this issue. In refusing to do so, the Court plainly denied to petitioners due process of law.

Respondents now say that while neither the opinion nor the judgment of the Supreme Court of Texas says so, the issue of fair offers to unitize can be passed on by the Railroad Commission in determining whether an allocation order should be entered which will allow petitioners to produce a sufficient amount of gas to repay drilling and production costs. This is certainly not what respondents contended in the Texas Supreme Court. Instead, they suc-

cessfully contended that the offers to unitize, shown in a bill of exception, should be taken into account by the Texas Supreme Court as a basis for holding that the 1/3 - 2/3 order was invalid and that petitioners had drilled their wells at their own risk and could not complain of heavy financial loss which would result to them from the cancellation of the Commission's order. The Texas Supreme Court of Texas does not say that the 1/3 - 2/3 allocation formula is cancelled conditionally or that upon a remand the Railroad Commission still may give petitioners substantially the same allowable, if any offers of unitization by respondents were not fair or valid. All that the Court does is to indicate that perhaps, if no fair offer to unitize had been made, then the Commission might have adopted an order which would allow the holders of Rule 37 permits to recover a sufficient amount of gas to repay drilling and production costs and provide a reasonable profit. However, the Court ruled that no such issue remains in this case by saying: (357 S.W. 2d at 376) (Quoted, petition for certiorari, 10)

"No such problem is before us."

This sentence, construed with the rest of the paragraph which it concludes, evidently means that the Texas Court holds that in this case petitioners as a matter of law drilled their wells at their own risk and that the Railroad Commission has no authority to pass upon any offer of unitization. This case is therefore in marked contrast with cases cited by respondents, such as *Laclede Gas Light Co. v. Public Service Commission*, 304 U.S. 398, in which the controversy was remanded to the administrative agency for further determinations of facts decisive of crucial issues.

6. *If, as respondents argue, the issue of offers of unitization can still be considered by the Railroad Commission, then petitioners are denied due process of law because no reasonably definite standard is given by the Texas Supreme Court, by reference to any statute or otherwise, by which it can be determined whether any offers to unitize were fair and valid so that petitioners must be denied a living allowable for their wells which they have drilled on their separate tracts.*

We have submitted primarily that the Texas Supreme Court has denied to petitioners the right to make their proof anywhere on the issue of unitization. If, however, we are wrong in this primary contention and if respondents correctly argue that the issue of unitization may still be tried before the Railroad Commission, then what are the standards for deciding as to what would be fair and valid offers of unitization?

Respondents concede, as the Texas Supreme Court did (Appendix "A", petition for certiorari, 47; 357 S.W. 2d at 376), that there is no statutory authority to compel unitization. There is statutory authority only for the different owners to agree voluntarily upon a method of unitization. If, therefore, as respondents now contend, the Railroad Commission can still pass on the issue of unitization, there is no statutory standard to guide the Railroad Commission in determining whether any offers to pool were fair and valid.

Nor can any standard be determined from the Texas Supreme Court's opinion. If the Commission must decide the issue of the fairness of offers to unitize, the Court does not tell the Commission what legal guide lines must be followed. Any decision by the Commission must be made on an arbitrary, as distinguished from a definite or reason-

ably ascertainable, basis. Moreover, petitioners, having already spent their money and drilled their wells, would be penalized by having their investments destroyed, if the Commission decides they were wrong in not unitizing their properties, without petitioners' ever having had an opportunity in advance to have this crucial issue determined. For this additional reason, even under respondents' construction of the Texas Supreme Court's opinion, petitioners have been denied due process.

## Conclusion

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted and that the judgment of the Texas Supreme Court be reversed.

Respectfully submitted,

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I, Levert J. Able, attorney for Petitioners, depose and say that I have served copies of the foregoing Reply Brief for Petitioners by mailing the same by United States Mail, Certified Mail, Return Receipt Requested, to the following counsel of record in said cause:

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Subscribed and sworn to before me on this the 28 day of September, A. D. 1962.

J. Brunson

Notary Public in and for Harris County, Texas

No. 341

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

H. L. DILLON, JR., ET AL., *Petitioners*

v.

MICHEL T. HALBOUTY, ET AL., *Respondents*

**On Petition For Writ Of Certiorari To The Supreme Court of Texas**

## MEMORANDUM BY CITY OF PORT ARTHUR, TEXAS, IN SUPPORT THEREOF AS AMICUS CURIAE

This memorandum is filed by the City of Port Arthur, Texas, a municipality and a political subdivision of the State of Texas, as amicus curiae, in support of the view that the Court should grant the Petition for Writ of Certorari filed by Petitioners, H. L. Dillon, Jr. et al. The Petition for Writ of Certiorari by H. L. Dillon, Jr.,

et al., now pending is from the Judgment of the Supreme Court of Texas invalidating the order by the Railroad Commission of Texas which reversed and rendered the Judgment of the trial court which had sustained the gas proration order of the Railroad Commission of Texas. It is the view of the City of Port Arthur, as amicus curiae, that said decision is invalid under the due process clause of the 14th Amendment of the United States Constitution and that the questions are substantial and will have a far reaching effect and warrant consideration by this Honorable Court:

1. The effect of the decision will be that some twenty-two (22) wells drilled on small tracts in the Port Acres Field (several of which are drilled on tracts owned by our negro residents) will have their allowables cut so low that they will not be able to be operated at a profit and will be shut down and taken off the tax rolls. Said wells are located within the City Limits of the City of Port Arthur, your Amicus Curiae, and will mean a loss of ad valorem taxes to the City of Port Arthur, your Amicus Curiae, of over $30,000.00 per year. The City of Port Arthur has a population of 70,000 and this will cause not only a great hardship to the Petitioners and the royalty owners, who stand to have confiscated their investments running into millions of dollars, but to the City of Port Arthur, Texas. This loss of revenue to the City of Port Arthur will be a very serious loss economically.

2. The dissenting opinion of Justice Clyde Smith of the Supreme Court of Texas clearly points out that the majority opinion of the Supreme Court of Texas deprived the Petitioners of their property rights, because there was an indication in the record by bill of exception that they

were offered unitization and because of their refusal of the offer, they drilled the wells at their own risk. (See Dissenting Opinion of Clyde Smith, Appendix "B" to the Petition for Writ of Certiorari, Page 53). The failure of the Court to remand for new trial on the question of offers to pool is contrary to the decisions of the Supreme Court of the United States and deprived the Petitioners of a fair hearing on the paramount question of unitization.

3. The opinion of the majority attempts to do by indirection that which the Legislature has not seen fit to authorize; that is, it authorizes compulsory pooling by indirection. This is shown by the minority opinion of Justice Clyde Smith which clearly stated this as follows:

> "The right of separate development of small tracts, where the owners did not voluntarily pool with other tracts, has never been questioned in former decisions. Even though the Legislature in Article 6014, Vernon's Annotated Civil Statutes, gave the Railroad Commission broad authority to enact orders to prevent waste, the Legislature was very careful in paragraph (g) of this statute to expressly declare that it was not the intention of the Legislature to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership. . . .
>
> "My contention is simply this: The statutes now in effect do not compel unitization. Therefore, the Railroad Commission has no legal authority to enter orders which would have the effect of requiring or compelling unitization." (See Appendix "B" to Petition for Writ of Certiorari, Pages 56-57).

As is pointed out in the minority opinion of Justice Smith, Appendix "B" to the Petition for Writ of Certio-

rari, Pages 53-54, there are no standards or guides that the Railroad Commission will have available to them in carrying out the decision of the Supreme Court, and the Petitioners and every other small tract owner in the State of Texas are subject to having their property rights confiscated or severely restricted on a regulation or court decision that is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, which is contrary to the principle of *Connally v. General Construction Co.*, 269 U.S. 385, 391. This will destroy competition in the production of gas by the small tract owners in the State of Texas and will, therefore, restrict the production and sale of gas throughout the State.

4. The decision of the Supreme Court of Texas is an unusual and novel decision in that it has reversed and failed to follow an unbroken line of decisions and has held contrary to previous decisions affirmed by this Court in *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U.S. 573; *Railroad Commission v. Rowan & Nichols Oil Co.*, 311 U.S. 578; *Railroad Commission v. Humble Oil & Refining Co.*, 193 S.W. 2d 824 (Tex. Civ. App., writ refused, no reversible error), affirmed in *Humble Oil & Refining Co. v. Railroad Commission* and *Williams v. Railroad Commission*, 331 U.S. 791; as well as previous decisions by the Texas Supreme Court, which held that the Railroad Commission was justified in assigning a much larger portion of the allowable production on a per well basis than the acreage would entitle the well to. The dissenting opinion points this out as follows:

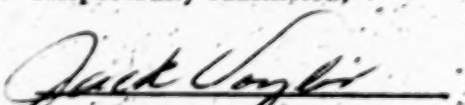
> "I respectfully dissent. Upon further consideration, I find that to agree with the majority would place me in a completely inconsistent position with that of for-

mer decisions of this Court, especially those wherein I was the author of the majority opinion. This is especially true when considered in the light of the decisions in Ryan Consolidated Petroleum Corporation v. Pickens, 155 Tex. 221, 285 S.W. 2d 201, and other cases discussed herein." (See Appendix "B" to the Petition for Writ of Certiorari, P. 49).

As a result the Federal questions, and the violation thereof by the decisions of the Texas Supreme Court, set out in the Petition for Writ of Certiorari are raised and brought before this Court for the first time.

The questions raised in the Petition for Writ of Certiorari by the Petitioners are substantial and warrant a full review by this Honorable Court because of the violation of the Petitioners' federal rights and because of the far reaching operational effect of said decision in the oil and gas industry and upon the tax structure of this Amicus Curiae, the City of Port Arthur, Texas, and others similarly situated.

Respectfully submitted,



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I, Jack Voyles, Attorney for the Amicus Curiae, City of Port Arthur, Texas, depose and say that I have served copies of the foregoing Amicus Curiae Brief of the City

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SUBSCRIBED AND SWORN to before me, on this the 9th day of October, A. D. 1962.

Mrs. Durelle Chapin

Notary Public in and for
Jefferson County, Texas
MRS. DURELLE CHAPIN